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THE
ONTARIO REPORTS

CASES DETERMINED IN THE SUPREME COURT
OF ONTARIO (THE COURT OF APPEAL FOR
ONTARIO AND THE HIGH COURT OF
JUSTICE FOR ONTARIO).

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EDITOR :
ALAN BURNSIDE HARVEY
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JUDGES
OF THE
SUPREME COURT OF ONTARIO
DURING THE PERIOD OF THESE REPORTS.

THE COURT OF APPEAL FOR ONTARIO.

Chief Justice of Ontario.

The Honourable ROBERT SPELMAN ROBERTSON.

Justices of Appeal.

The Honourable WILLIAM RENWICK RIDDELL.
The Honourable WILLIAM EDWARD MIDDLETON.
The Honourable ROBERT GRANT FISHER.
The Honourable WILLIAM THOMAS HENDERSON.
The Honourable CHARLES PATRICK McTAGUE.
The Honourable JOHN GORDON GILLANDERS.
The Honourable ROY LINDSAY KELLOCK.
The Honourable ROBERT EVERETT LAIDLAW.

THE HIGH COURT OF JUSTICE FOR ONTARIO.

Chief Justice of the High Court.

The Honourable HUGH EDWARD ROSE.

Judges of the High Court of Justice.

The Honourable JOHN ANDREW HOPE.
The Honourable GEORGE FRANKLIN McFARLAND.
The Honourable JAMES CARDWELL MAKINS.
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The Honourable FRED HOLMES BARLOW.

ATTORNEYS-GENERAL FOR ONTARIO.

The Honourable GORDON DANIEL CONANT, K.C.
The Honourable ERIC WILLIAM CROSS, K.C.
The Honourable LESLIE EGERTON BLACKWELL, K.C.

MEMORANDA.

The Honourable WILLIAM EDWARD MIDDLETON, a Justice of Appeal, resigned his office as of 7th January 1943.

The Honourable ROBERT EVERETT LAIDLAW, one of His Majesty's counsel, was appointed a Justice of Appeal on 4th February 1943.

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REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT OF ONTARIO

1943

[COURT OF APPEAL.]

The City of Toronto v. Rogers-Majestic Corporation Limited.

Taxation—Municipal Income and Business Assessment—“Income Not Derived from Business”—Parent and Subsidiary Companies—Right of Appeal—The Assessment Act, R.S.O. 1937, c. 272, ss. 9(1)(b), 85(1).

R. Co., which manufactured radio sets and parts, and other electrical equipment, also carried on a broadcasting business. In 1934 a new company was formed, known as R.B. Co., which took over the broadcasting business. R. Co. transferred all the plant and equipment in connection with this business, and received in return all the capital stock and an issue of bonds of R.B. Co. The two companies had interlocking directorates, and R.B. Co. advertised the products of R. Co. without charge. The interest on the bonds was not actually paid in cash to R. Co., but was paid by means of a journal entry, the books of R.B. Co. being kept at the head office of R. Co.

Held, Riddell J.A. dissenting, the interest on these bonds was “income not derived from the business” with respect to which R. Co. was assessed for business tax, and was therefore taxable under s. 9(1)(b) of The Assessment Act, R.S.O. 1937, c. 272.

Held, further, unanimously, the question involved in this appeal, being one of the proper construction of the statute, and of the application of the statute to the facts as found by the trial judge, was a question of law, and hence appealable under s. 85(1) of the Act. *Re The City of Toronto and The Famous Players Canadian Corporation Ltd.*, [1935] O.R. 314, [1935] 3 D.L.R. 327; *Re International Metal Industries Ltd. and the City of Toronto*, [1940] O.R. 271, [1940] 3 D.L.R. 50, distinguished.

AN appeal by stated case from the judgment of Macdonell Co. Ct. J., of the County Court of the County of York, holding that certain interest paid to the respondent company by a subsidiary company, on bonds of the latter company, was not “income not derived from the business” in respect of which the parent company was assessed for business tax, within the meaning of s. 9(1)(b) of The Assessment Act, R.S.O. 1937, c. 272.

The stated case was as follows:

MACDONELL Co. Ct. J.:—Pursuant to the powers conferred by s. 123 of The Assessment Act, R.S.O. 1937, c. 272, the Cor-

poration of the City of Toronto enacted by-law 14140 dated 25th June 1934, as amended by by-law 14584 dated 29th June 1936, being a by-law respecting taxation of income.

The respondent is a company with its head office at 622 Fleet Street West, in the city of Toronto, where it occupies or uses land for the purpose of carrying on its business. It was assessed in the year 1939 for business assessment as a manufacturer under s. 8(e) of The Assessment Act.

It was also entered on the roll of taxable income under s. 123 of the said Act for the year 1940 for taxable income for the sum of \$14,625. The respondent admitted that it had a taxable income of \$4,125, but disputed its assessment for the balance of \$10,500, and appealed to the Court of Revision, which confirmed the said assessment. The respondent then appealed and the hearing came on before me, at which time the appellant asked me to make a note of any question of law or construction of the statute that might arise and to state the same in the form of a special case for the Court of Appeal.

The amount in dispute is the said sum of \$10,500 which was credited to the respondent company by Rogers Radio Broadcasting Company Limited and received as interest on bonds of the latter company held by the respondent company.

Prior to 1934 the respondent company owned and operated broadcasting station CFRB as part of its business. In that year Rogers Radio Broadcasting Company Limited was incorporated and the respondent company transferred to the broadcasting company certain capital assets including land, buildings and equipment used in connection with the operation of the broadcasting branch of the business. The respondent company received as consideration for such transfer \$200,000 in bonds of the broadcasting company as well as the entire issued capital stock. At the present time \$150,000 of bonds are still held by the respondent company, the balance having been redeemed.

The broadcasting company was incorporated and the bond issue created in order that the respondent company might have an asset upon which it could borrow money for its purposes, and the bonds were used for that reason.

The broadcasting company carried on the business of radio broadcasting thereafter (particularly in the year 1939, which is the year under consideration in this case), operating radio station CFRB, and was assessed for business assessment in

respect of the premises occupied by it for this purpose at 37 Bloor Street West, in the city of Toronto, under s. 8(k) of the said Assessment Act.

The board of directors of the broadcasting company consists of three of the directors of the respondent company and two of the engineers of the broadcasting company. The companies have the same president and the same secretary. Mr. Harry Sedgwick, the manager of the broadcasting company, is a director of both companies.

The income of the broadcasting company is derived from the carrying on of the business of a broadcasting station. The books of the broadcasting company are kept at the head office of the respondent company and are under the general supervision of the Comptroller of the respondent company. The bookkeeper for the broadcasting company was at the office of the respondent company, and was paid by the respondent company, and a part of her salary was charged by journal entry against the broadcasting company.

The broadcasting station is used for the purpose of advancing by advertising, without charge, the sale of the radio receiving sets of the respondent company.

Equipment for the broadcasting company in some cases was made by the respondent company and charged to the broadcasting company at cost.

The interest which is in question was not paid in cash but was charged by the respondent company to the broadcasting company by means of journal entry and was thus received by the respondent company. The profits of the broadcasting company were turned over to the respondent company and treated as an asset of the broadcasting company and a liability of the respondent company.

The following powers are included in the letters patent of the respondent company, dated 13th May 1925:

“(a) To manufacture, sell, lease, purchase, import, export and otherwise dispose of and deal in radio and electrical machines, appliances, accessories and equipment of all kinds;

“(b) To manufacture, sell, lease, purchase, import, export and otherwise dispose of and deal in all kinds of goods and merchandise directly or indirectly connected with or entering into the manufacture, construction and assembling of radio and electrical machines, equipment, accessories and appliances, or

the erection, equipment and operation of radio reception and transmission stations;

“(d) To build, acquire, equip, operate and dispose of radio reception and transmission stations;

“(i) To purchase, take or acquire by original subscription, or otherwise, and to hold, sell or otherwise dispose of shares, stock, debentures and other obligations in and of any other company and to vote all shares so held through such agent or agents as the directors may from time to time appoint.”

The respondent company occupies three premises, one at 622 Fleet Street West, one at the Crosse and Blackwell plant on Fleet Street and one in a building on Hanna Street, at each of which it is assessed for 60 per cent. of the value of the land occupied by it, as a manufacturer. It manufactures radios, radio parts and equipment, electric refrigerators and similar products. Its income is derived from the sale of these products through a large jobber organization across Canada. The annual financial statements of the two companies indicate that both carry on a substantial business. In the year 1939 the broadcasting company had a net operating profit of \$126,621.09 and the consolidated statement of the respondent company and its subsidiaries shows a net operating profit of \$101,308.26.

DECISION.

Upon these facts, I decided the said sum of \$10,500 was not taxable and allowed the appeal, reducing the assessment to \$4,125.

REASONS FOR MY DECISION.

Counsel for the appellant contended that because there were two corporations, each liable for business tax, carrying on separate businesses, the said sum of \$10,500 received by the respondent company from the broadcasting company as interest on bonds of the broadcasting company could not be income derived by it from the business in respect of which it was assessable under s. 8. He claimed that upon the proper construction of the said s. 9(1)(b) the amount was assessable. I disagreed with this contention, whereupon counsel asked that I submit this question of law for the opinion of the Court of Appeal. Upon my construction of the statute I considered that I should find as a fact that the said sum was received as income derived from the business of the respondent company and was not assessable.

QUESTION.

Upon a true construction of The Assessment Act, particularly section 9(1) (b), was I right in deciding that the said sum of \$10,500 did not form part of the taxable income of the respondent company in the year 1940?

10th and 12th November 1942. The appeal was heard by RIDDELL, FISHER and McTAGUE JJ.A.

Samuel Rogers, K.C., for the respondent: S. 85(1) of The Assessment Act, R.S.O. 1937, c. 272, provides that an appeal shall lie to the Court of Appeal from the judgment of a judge where a question of law or the construction of a statute is involved. I take a preliminary objection that no appeal lies to this Court in this case because the question is one of fact: *Re The City of Toronto and The Famous Players Canadian Corporation Ltd.*, [1935] O.R. 314, [1935] 3 D.L.R. 327, affirmed [1936] S.C.R. 141, [1936] 2 D.L.R. 129; *Re International Metal Industries Ltd. and The City of Toronto* [1940] O.R. 271, [1940] 3 D.L.R. 50; *Re Russell Industries Ltd. and The City of Toronto*, [1941] O.W.N. 147, [1941] 3 D.L.R. 361.

In the *International Metal Industries* case Gillanders J.A. fully reviewed all the authorities, and then concluded that the question as to whether income proposed to be assessed was derived from independent sources outside the business was a question of fact, and therefore not a proper question to be reviewed by this Court. In the case at bar the trial judge has found as a fact that the income in dispute was not taxable. [McTAGUE J.A.: Does his calling it a fact make it one in reality?]

J. Palmer Kent, K.C., for the appellant, in reply to the preliminary objection: S. 9(1) (b) of The Assessment Act is the relevant provision governing this situation. Such questions as the one now before this Court must be decided on a strict construction of the statute. [McTAGUE J.A.: The *International Metal Industries* case and *Re Russell Industries Ltd.* were both decided under s. 9(1) (a) of the Act, while this is definitely under s. 9(1) (b).] Yes, and in the *Famous Players* case, all the companies were in the theatre business, and Famous Players completely controlled everything; it was all one business. If there had been a definite finding of fact by the trial judge, then no appeal would lie to this Court.

It is the submission of the appellant that all income derived by a corporation in Ontario is subject to taxation. Business assessment applies only to income that is received by a corporation in its business; and it was not part of the respondent company's business to buy bonds. When the respondent company received income by way of interest on bonds held by it, that was income not derived from the business in respect of which it was assessable under s. 8 of the Act, and was taxable under s. 9(1) (b). The construction of a statute is a matter of law and with respect, the trial judge construed the statute incorrectly. It cannot be said that the respondent company was carrying on a broadcasting business, but the subsidiary company was assessable for the business tax by reason of premises occupied on Bloor Street and elsewhere in Toronto; and the broadcasting company was carrying on a different business from the business in respect of which the respondent company was assessable. No part of s. 8 of The Assessment Act deals with the broadcasting business; therefore, s. 8(k) is applicable. If the principle of *Re Lever Brothers Limited and City of Toronto*, 1923, Ontario Municipal Board Annual Report, p. 44 (see 54 O.L.R. 83n), and *Re City of Toronto and John Northway & Son Limited* (1923), 54 O.L.R. 81, is to be followed, then the business of the broadcasting company is the business of that company only; but when it pays some of its money over to the parent company as interest, then the parent company cannot claim that that is money derived from the business in respect of which it is assessable in regard to business tax. The respondent company derives money by way of interest; interest is included in the definition of income; this company is not receiving money by way of a management fee;—it is the same as the dividend in the *Northway* case. The question as to whether the respondent company is assessable for income depends upon the construction of sections of The Assessment Act, and is definitely a question of law: see *Loblaw Groceries Co. Limited v. The Corporation of the City of Toronto*, [1936] S.C.R. 249, [1936] 3 D.L.R. 346, in which the most important point was the meaning of s. 8 of The Assessment Act. Similar problems are constantly before the House of Lords. As stated earlier in the argument, the *Famous Players* case, the *International Metal Industries* case and the *Russell Industries* case are all distinguishable. The two latter cases involved questions of fact, and the facts were decidedly within

the scope of 9(1)(a) of The Assessment Act. The *Famous Players* case was decided on a very particular set of facts and should therefore be distinguished. The Court of Appeal there decided that the finding of the Ontario Municipal Board, that all the operations of the company and its subsidiaries constituted "one business", was a finding of fact. Consequently, this Court is not bound by that decision.

The stated case as drawn involves principles of far-reaching significance. If it can be established that the question is one of law, it will be a guiding principle of considerable importance. The *Lever Brothers* case is closely allied to the one at bar, and of further assistance is a passage in Masten and Fraser's Company Law, 4th ed., pp. 28 and 29, and the decision in *Re Wallace Realty Co. and City of Ottawa*, 64 O.L.R. 265, [1929] 4 D.L.R. 784, and on appeal, [1930] S.C.R. 387, [1930] 3 D.L.R. 417.

Samuel Rogers, K.C., for the respondent: It is submitted that the viewpoint taken by the appellant's counsel requires much too narrow a construction of The Assessment Act. [FISHER J.A.: Does it matter that the board of directors of the parent and subsidiary companies interlock?] No; the broadcasting company is merely carrying on the business of the parent company as its agent. [McTAGUE J.A.: The tendency for a long time has been in the direction you are now arguing but what of the decision of the Privy Council in *Salomon v. A. Salomon and Company, Limited*, [1897] A.C. 22, under which the subsidiary company, from which the interest was derived, is a separate legal entity?] If the *Famous Players* case is still good law, the case at bar is within the four corners of that decision. Perhaps a separate corporate entity exists, but for the purpose of The Assessment Act the broadcasting company must be considered a mere agent of the parent company to carry on its business. [FISHER J.A.: How do you determine that the broadcasting company is an agent of the parent company?] From the evidence in the stated case itself. The learned trial judge finds this as a fact. [RIDDELL J.A.: It is a question of law, not of fact. I do not agree with the *Famous Players* case.] [McTAGUE J.A.: How can a County Court Judge or the Municipal Board say that he finds or that it finds a question of fact that must be based on the construction of a section of the statute, which is purely a question of law, labelled fact?] All these questions in the cases cited to this Court on the hearing of the

preliminary objection, are stated as questions of fact, not of law. In the *Famous Players* case, the point whether income was or was not derived from business was held to be a question of fact. That case arose under the same section as the case at bar. The *International Metal Industries* case was admittedly under a different section. Gillanders J.A. dealt with this specific point. [RIDDELL J.A.: In the *Lever Brothers* case, the original company did not derive its money from its business.] The authorities indicate that it is a question of fact, and the finding here is based on facts as stipulated in the stated case. The trial judge found that the interest from the bonds of the broadcasting company was income derived from the business in respect of which the parent company was assessable under s. 8 of The Assessment Act. This is a finding of fact, that the broadcasting business was a part of the respondent's business, in respect of which it was assessed for business tax; and therefore that the income received by way of interest upon the said bonds is not taxable. Before 1934, the broadcasting business was carried on by the respondent company itself. The business of broadcasting is not a separate business—it was originally established by the parent company in order that there might be good broadcasting where receiving sets were sold in this community. *Re City of Toronto and John Northway & Son Limited*, [1923] 54 O.L.R. 81, is a decision entirely on its own merits. A salient paragraph in the judgment of Middleton J.A. in *Re The City of Toronto and The Famous Players Canadian Corporation Ltd.*, [1935] O.R. at p. 324, [1935] 3 D.L.R. 327, is the following: "Its mode of carrying on its business is no concern of the municipality. That is an affair of the company and its subsidiaries and contractors alone." Prior to 1934 the broadcasting business was carried on exactly as it is carried on today.

J. Palmer Kent, K.C., in reply. It is submitted that there is not a finding of fact at all. There is no evidence that the respondent company was carrying on as an agent. *Export Brewing and Malting Company Limited v. Dominion Bank*, [1937] 2 W.W.R. 568, [1937] 3 All E.R. 555, [1937] 3 D.L.R. 513.

Cur. adv. vult.

10th December 1942. RIDDELL J.A. (*dissenting*) [after setting out the stated case]:—The respondent contends that the appeal is on facts and not on law. The result being the same

however the appeal is looked upon, I do not think it necessary to discuss this question at any length; the result in my opinion is the same whatever view we take of the case.

I content myself with saying that whatever view be taken in other cases, here, the facts being clear, and the sole question being the application to these facts of the provisions of a statute, the sole question is one of law.

But I entirely agree with the conclusion of the learned County Judge and would so declare, the appellant to pay the costs.

FISHER J.A.:—This is a stated case submitted by His Honour Judge Ian Macdonell, one of the judges of the County Court of the County of York, for the opinion of this Court.

The income assessed, and the subject of this appeal, has its origin in bonds of \$200,000 issued by Rogers Radio Broadcasting Company Limited, hereafter referred to as “the broadcasting company”, and by it delivered to the respondent in consideration of the sale or transfer by that company to the broadcasting company of the lands, buildings and equipment formerly used by the respondent in connection with its business. The appellant assessed the income from the bonds under s. 9(1)(b) of The Assessment Act, R.S.O. 1937, c. 272. That section reads:

“every corporation although liable to business assessment under section 8 shall also be assessed in respect of any income not derived from the business in respect of which it is assessable under that section.”

The learned judge was of opinion, and found, that the income received by the respondent on these bonds was derived from the business of that company as manufacturers and was not taxable. This appeal followed, and counsel for the respondent, in support of the findings of the judge, contended that by reason of the fact that the respondent owned the capital stock of the broadcasting company and used the facilities of that company to advertise its products, and because there were interlocking directorates and the bookkeeping of the broadcasting company was done at the head office of the respondent, the business of the broadcasting company is and was part of the business of the respondent, and therefore, the respondent being assessed for business tax under s. 8, the income from the bonds was not taxable under s. 9(1)(b).

On the facts and the construction of sections 8 and 9(1) (b), I am unable to agree with this contention. The broadcasting company and the respondent are two separate incorporated entities, carrying on distinct and different types of business in open competition with all others carrying on businesses of a similar character. The respondent company, as found by the County Judge, was carrying on business as a manufacturer of radios, electric refrigerators and other like products at three different premises in Toronto, and the other, the broadcasting company, as also found by the trial judge, was carrying on its broadcasting business at 37 Bloor Street West, Toronto.

The main question for determination is: Was the income from these bonds derived from the business of the respondent as a manufacturer, or was it income derived from an independent source?

The learned judge found, as stated, that the income received by the respondent on these bonds was derived from the business of that company as a manufacturer. With respect, I am not able to agree with that finding. The income in the first place was earned in and from the operation of the business of the broadcasting company, and the payment of the income by that company to the respondent was in discharge of the interest due on these bonds, and it was not income derived from the manufacturing business. It was all income from an independent source.

To my mind it might just as well be argued that if the broadcasting company had, in payment for the assets of the respondent company, delivered bonds of some other corporation, the interest received on these bonds could be held to be income derived by the respondent company in carrying on its business as a manufacturer. The word "business", found in s. 9(1) (b), means business carried on by the respondent company and assessable for business and not income tax.

It is argued that the question for determination here, or the right of appeal, is the same as that raised in *Re The City of Toronto and The Famous Players Canadian Corporation Ltd.*, [1935] O.R. 314, [1935] 3 D.L.R. 327, that consequently the question is one of fact, and that therefore, as was held in that case, no appeal lies. In that case Masten J.A., with whom the majority of the Court agreed, said at p. 325:

“A determination of the nature of the respondent’s business is *prima facie* a question of fact. Circumstances may exist where it involves a question of law, but here it seems to me to depend on whether the various subsidiary corporations are independent personalities, or are mere agents controlled as such by the respondent company for the carrying on of its own business. That appears to me to be a question dependent solely on the facts adduced in evidence.”

In this case it seems to me that the circumstances are such that the question involved here in determining the true relationship between the manufacturing company and its subsidiary company, the broadcasting company, is a question of the proper legal conclusion from the facts as found by the learned County Judge, and is therefore at the least a mixed question of law and fact. No doubt the broadcasting company is in a sense the agent for the manufacturing or parent company. But the question goes further than that; it is a question whether the broadcasting company is an agent for the manufacturing company for the carrying on of the business in respect of which the manufacturing company is assessed for business tax. The facts show that the subsidiary company is an agent for carrying on a subsidiary or separate business which the manufacturing company finds it more convenient to separate from its own business—the business in respect of which it is assessed for business tax—and carry on through an agent. Part, no doubt, of the broadcasting company’s business is the advertising of the parent company’s wares and merchandise, but by far the greater part of its business is an entirely independent business, and it is from that part of its business that it derives the profits out of which the interest on the bonds is paid.

The question whether the subsidiary company is an agent for the parent company is, under the ruling of Masten, J.A., in the *Famous Players* case, a question of fact, but the nature of the agency is a question of law. Here the nature of the agency must be held to be that of an agency for the carrying on of a business separate from that of the parent company, and once that conclusion is reached it becomes apparent that income derived by the parent company in any manner whatsoever from that agency is not income derived from the business for which the parent company is assessed for business tax. In the words of s. 9(1)(b) of The Assessment Act, therefore, the appellant

“although liable to business assessment under section 8 shall also be assessed in respect of [*this particular*] income not derived from the business in respect of which it is assessable under that section.”

For these reasons I would allow the appeal with costs.

MCTAGUE J.A.:—I have read the reasons of my brothers Riddell and Fisher, and agree with my brother Fisher in the result. The reasons of my brother Riddell set out the statement of the case by the learned County Court Judge in detail, so that I feel there is no necessity for me to enlarge upon the problem on which advice is sought.

It seems to me that the result must be determined in general on the long-established principle set forth in *Salomon v. A. Salomon and Company, Limited*, [1897] A.C. 22.

The respondent is a corporation carrying on the business of manufacturing, and is assessed for business tax on that basis. It formerly owned and operated radio broadcasting station CFRB in Toronto, and in its letters patent is still retained the power to operate radio broadcasting stations. However, in 1934, Rogers Radio Broadcasting Company Limited was incorporated and acquired the assets of the respondent used in connection with its broadcasting business. I do not think it makes any difference that the respondent owns the capital stock of the broadcasting company or that it owns all of its outstanding bonds, or that there are interlocking boards of directors, or that its accounting is done by the parent company. The broadcasting company in fact carries on the business of broadcasting, and the respondent in fact carries on the business of manufacturing. This being the case, it seems to me that the interest on the bonds of the broadcasting company is income in the hands of the respondent not derived from the business in respect of which it is assessable for business tax.

The respondent contended that no appeal could lie to us, the question being one of fact, and relied on the *Famous Players* case, *supra*, and *Re International Metal Industries Ltd. and the City of Toronto*, [1940] O.R. 271, [1940] 3 D.L.R. 50. An examination of the question propounded to us clearly shows that whether the section was properly construed or not is an integral part of the question submitted—surely a matter of law.

Accordingly I would join with my brother Fisher in allowing the appeal. The question should be answered in the negative.

Appeal allowed with costs, Riddell J.A. dissenting.

Solicitor for the appellant: C. M. Colquhoun, Toronto.

Solicitors for the respondent: Rogers & Rowland, Toronto.

[COURT OF APPEAL.]

Fingland v. Brown and Garon.

Motor Vehicles—Negligence—Reasonableness of Jury's Findings—Collision—Onus—Misdirection—Substantial Wrong or Miscarriage—The Judicature Act, R.S.O. 1937, c. 100, s. 27.

If A., the driver of an automobile, having got out and started back along the road to warn oncoming traffic that the road is blocked, is struck by another car travelling in the same direction, which first strikes A's car, and pinned between this other car and that of B., which is stopped beside A's car, it is arguable whether or not A., in an action for damages against B. and the driver of the third car, is entitled to the benefit of s. 48(1) of The Highway Traffic Act, R.S.O. 1937, c. 288, as to onus. If, in addition to his claim for personal injuries, he includes a claim for damages to his car, it is clear that s. 48(2), which excludes the operation of subs. 1 in cases of collision, applies, and it is a misdirection to tell the jury, in such circumstances, that the onus is on the other drivers. *Carter v. Van Camp et al.*; *Van Camp v. Carter and Anderson*, [1930] S.C.R. 156, [1929] 4 D.L.R. 625, referred to. If, however, the jury have made positive findings of negligence against the other two drivers, and have specified in what such negligence consisted, an appeal will be dismissed, under s. 27 of The Judicature Act, R.S.O. 1937, c. 100, on the ground that no substantial wrong or miscarriage of justice has occurred. *Winnipeg Electric Company v. Geel*, [1932] A.C. 690, [1932] 4 D.L.R. 51, 40 C.R.C. 1, [1932] 3 W.W.R. 49; *McAuliffe v. Hubbell*, 66 O.L.R. 349, [1931] 1 D.L.R. 835, applied.

The Court should be careful, on such an appeal, to avoid substituting its own opinion for that of the jury, if the jury's finding is based upon reasonable evidence; its function is limited to determining whether or not there was evidence which reasonably justified the verdict. *Smith v. Harris*, [1939] 3 All E.R. 960, and other authorities, applied.

AN appeal by the defendant Brown from the judgment entered by Greene J. upon the findings of a jury. The facts are fully stated in the judgment.

20th and 21st October 1942. The appeal was heard by ROBERTSON C.J.O. AND MIDDLETON AND GILLANDERS JJ.A.

T. N. Phelan, K.C., for the defendant Brown, appellant: Garon's negligence was solely responsible for the accident. The presence of Brown's car on the highway was a mere "condition" or *causa sine qua non*, and not an effective cause of the accident. If reliance is placed on the fact that Brown's car

blocked the highway, why should the plaintiff not be in the same position? *Gives v. Canadian National Railways*, [1941] O.W.N. 376 at 379, [1941] 4 D.L.R. 625; *McLaughlin et al. v. Long and Long*, [1927] S.C.R. 303, [1927] 2 D.L.R. 186; *Goodwin v. Goodwin and The Canadian Pacific Railway*, [1933] O.R. 225, 40 C.R.C. 316, [1933] 1 D.L.R. 753; *Bradley et al. v. Wallaces, Limited*, [1913] 3 K.B. 629 at 637; *The Directors etc. of The Metropolitan Railway Company v. Jackson* (1877), 3 App. Cas. 193 at 210; *Weld-Blundell v. Stephens*, [1920] A.C. 956 at 975-6. Had Garon's car been able to turn to the east (i.e., had Brown's car not blocked that side of the road), it would have run down the plaintiff, who was directly in the path, and probably killed him.

Garon's negligence was *novus actus interveniens*: *Rickards v. Lothian*, [1913] A.C. 263; *Cutler v. United Dairies (London), Limited*, [1933] 2 K.B. 297; *Speers et al. v. Griffin et al.*, [1939] O.W.N. 352.

There was no onus on Brown under s. 48(1) of The Highway Traffic Act, R.S.O. 1937, c. 288; the accident was caused as much by the presence of the plaintiff's car on the highway as by the presence of ours [ROBERTSON C.J.O.: But there was a crushing of the plaintiff between the cars of the two defendants—there was physical contact with the two cars]. There is an equal onus on the plaintiff himself because of the presence of his car on the highway: *Maitland v. Mackenzie* (1913), 28 O.L.R. 506 at 510, 13 D.L.R. 129; *Marshall v. Gowans* (1911), 24 O.L.R. 522; *Storry v. Canadian National Railway Company*, [1940] S.C.R. 491, 51 C.R.T.C. 161, [1940] 3 D.L.R. 554.

There was no evidence whatever, until Garon's defence was put in, after Brown's case had been closed, that Brown's car entered in any way into the matter. The case against us should have been dismissed.

There should have been a definite question to the jury as to whether the presence of Brown's car was the cause of the accident, and questions 1 and 3 to the jury were improperly framed. The case against Brown should have been clearly differentiated in the charge from that against Garon, particularly in view of the fact that Brown's case was closed before Garon gave evidence: *McDonald v. Adams* (1932), 41 O.W.N. 145

The verdict must be set aside as to Brown. No jury, properly instructed and viewing the evidence judicially, could have found

him more negligent than Garon: *McCannell v. McLean*, [1937] S.C.R. 341, [1937] 2 D.L.R. 639.

A. A. *Macdonald*, K.C., for the plaintiff, respondent: Brown's counsel did not announce that he was not offering evidence until after Garon's counsel had addressed the jury and announced that he was calling his client. The trial judge called on Garon first, and Brown's counsel had no right to close his case at that stage. I am therefore entitled to use Garon's evidence against Brown.

Where a man is on the highway as a pedestrian, and suffers physical injury from two motor vehicles, there can be no question that s. 48(1) casts the onus upon the owners or drivers of those vehicles. In any event, even if the appellant is right on this point, the other questions, with the jury's express findings of negligence, do away with any possible injustice: see *Carter v. Van Camp et al.*; *Van Camp v. Carter and Anderson*, [1930] S.C.R. 156, [1929] 4 D.L.R. 625.

There can be little argument as to the findings of fact, although there may be as to whether Brown's acts constituted negligence in law. At to "proximate cause", see *Turcotte et al. v. Mee*, [1940] 2 D.L.R. 228; *Schram v. Kearns et al.*, [1941] 2 W.W.R. 177, [1941] 3 D.L.R. 470. [ROBERTSON C.J.O.: Your case then is based, not upon the fact that Brown's car was the "buffer" against which the plaintiff was squeezed, but upon the continuing effect of his earlier negligence? GILLANDERS J.A.: You contend that it was all one continuous set of circumstances?] Yes. I refer to Winfield, *The Law of Tort*, p. 71, and Salmond's *Law of Torts*, 9th ed., pp. 138, 139, note (a), 140, 143 and 149. Applying the principles there laid down, it makes no difference, for purposes of liability, whether the defendant acted deliberately, or whether the accident was the result of the incompetent handling of his automobile.

As to the effect of the jury's findings, I rely on *McCannell v. McLean*, [1937] S.C.R. 341 at 344, [1937] 2 D.L.R. 639; as to the negligence of Brown, see also *Baker v. E. Longhurst and Sons, Limited*, [1933] 2 K.B. 461.

E. L. *Haines* (D. *Haines* with him), for the defendant Garon, respondent: Garon is interested in supporting the judgment because he has thereby a judgment against Brown for 60 per cent. of the damages. Brown may be made liable through two channels—either directly to the plaintiff, or, by the operation of

The Negligence Act, R.S.O. 1937, c. 115, for a contribution. Approaching the case by this second channel, all the evidence given at the trial is clearly admissible against Brown.

The jury's findings are supported by the evidence, and show that Garon was prevented from using the left (east) side of the road because of Brown's negligence. As to the causal connection here, and the duties of the Court of Appeal, I refer to *O'Brien v. Lawlor* (1932), 41 O.W.N. 444; *Croston v. Vaughan*, [1937] 4 All E.R. 249; *Schram v. Kearns et al.*, [1941] 2 W.W.R. 177, [1941] 3 D.L.R. 470; *Smith v. Harris*, [1939] 3 All E.R. 960 at 962; *Corstar (Owners) v. Eurymedon (Owners)*; *The Eurymedon*, [1938] P. 41, [1938] 1 All E.R. 122 at 125, 127, 131, 132, 133.

The "proportional rule" of admiralty law is the same as is now applicable under The Negligence Act; *Landreville and Gardner v. Brown*, [1941] S.C.R. 160, [1941] 4 D.L.R. 609; also [1942] 3 D.L.R. 364; see also *Turcotte et al. v. Mee*, [1940] 2 D.L.R. 228 at 236.

As to *novus actus interveniens*, see *Haynes v. Hardwood*, [1935] 1 K.B. 146. The plaintiff's act in going back to warn other drivers is the best evidence that Brown had created a dangerous situation.

As to the onus, the plaintiff was crushed between the two cars; the damage must be "by reason of" Brown's car as well: *Maitland v. Mackenzie* (1913), 28 O.L.R. 506, 13 D.L.R. 129 [ROBERTSON C.J.O.: But, as Mr. Phelan has pointed out, it was also "by reason of" the plaintiff's car, and there may be an onus on him]. The jury was entitled to infer, from the facts proved, anything which reasonably followed, and its inferences, if properly founded, are as strong as if based on definite sworn evidence as to the facts. The jury found that the presence of Brown's car had a causal connection with the accident, because Garon could not pass, and the onus section is therefore brought into play.

As to the charge to the jury, Mr. Phelan left the court room before the judge's charge was delivered. Only one objection to the charge was taken on Brown's behalf at the trial.

T. N. Phelan, K.C., in reply: Every objection now taken was taken and discussed in the judge's room, in connection with the questions to be submitted, *before* the charge was delivered, and it would have been pointless to repeat them afterwards.

There can be no issue as between the two defendants unless and until it is established that *both* are liable to the plaintiff for negligence.

27th November 1942. By direction of the Court, a further argument took place as to the question of onus, particularly with reference to the effect of s. 48(2) of The Highway Traffic Act.

T. N. Phelan, K.C.: Since the argument in this case, s. 48 has been considered in *Martin v. Deutch*, [1942] O.W.N. 583, [1942] 4 D.L.R. 529. It seems to be clear that there is an onus on Garon. [GILLANDERS J.A.: But here there is a claim for damages to the plaintiff's motor car.] Yes, but I am not concerned with Garon's onus, because he has not appealed. [ROBERTSON C.J.O.: Another possible distinction between that case and this is that before this plaintiff was hit, there had already been a collision between his car and Garon's, and this was what led to the plaintiff's injuries. How can that collision be eliminated?] I think it cannot. [GILLANDERS J.A.: If neither car had belonged to the plaintiff, and if he, a pedestrian, had been injured in a collision, would he be entitled to the benefit of the onus?] The only case where the circumstances are at all similar is *Carter v. Van Camp et al.*; *Van Camp v. Carter and Anderson*, [1930] S.C.R. 156 at 161, [1929] 4 D.L.R. 625.

Brown's car might equally well have been a wall against which the plaintiff was thrown by Garon's car. There is no evidence that the damage was sustained by reason of the presence of our car on the highway. [GILLANDERS J.A.: The jury have said that it was.] Yes, but they were under two misapprehensions, resulting from misdirection as to onus and from being permitted to consider Garon's evidence as part of the case against us. When we closed our case there was not a tittle of evidence as to any causal connection between the presence of our car and the plaintiff's injury.

A. A. Macdonald, K.C.: As the matter was put before the trial judge, and forecast in the notice of appeal, the whole point was the one last mentioned. No discussion took place as to the effect of the collision with the plaintiff's car.

S. 48(2) applies only where the injuries are sustained *in* a collision: *Carter v. Van Camp et al.*, *supra*. [ROBERTSON C.J.O.: But suppose a person, seeing that a collision is inevitable, gets out of his car at the instant before the impact, is he then entitled

to the benefit of the onus? The section contains no such limitation as you suggest. Why are the injuries here not "in the event of a collision"?] The point is a narrow one, but I rely on *Martin v. Deutch, supra*. [GILLANDERS J.A.: The effect of the judgment is to make Brown liable for 60 per cent. of the damage to the plaintiff's car. Is there any onus as to that damage?] It may be that the onus with respect to the damage to the car is on a different footing. Our injuries are not caused by a collision, but by the plaintiff being struck by Garon's car and pinned against Brown's.

[ROBERTSON C.J.O.: Does the presence of the plaintiff's car not contribute too, so that there is no statutory onus at all?] I submit that it is now too late to raise that question. Further, if there was an onus on us, it would not remove the onus on Brown, who is required, not to prove the plaintiff's negligence, but to disprove his own. *Winnipeg Electric Company v. Geel*, [1932] A.C. 690, [1932] 4 D.L.R. 51, 40 C.R.C. 1, [1932] 3 W.W.R. 49. There might easily be an onus on each party as to *his own* negligence. That will be the case, unless s. 48(2) is so interpreted as to exclude the statutory onus altogether. [ROBERTSON C.J.O.: The primary cause of the plaintiff's injuries was the collision with his own car. He might have received the same, or greater, injuries if Brown's car had not been there at all.]

Is it not arguable that a "collision" can occur only between two moving vehicles, and that s. 48(2) has no application where one of the vehicles is stationary?

In any event, even if the direction as to onus was wrong, there should be no new trial, since there has been no substantial wrong or miscarriage of justice.

E. L. Haines: Suppose, instead of the plaintiff, one of his passengers had got out, and the plaintiff had remained in his car, what would have been the position as to onus? There might have been an onus on all three drivers, each being required to show that he was not negligent, or that one of the other motorists caused the loss. It was not suggested by anyone at the trial that there was any onus on the plaintiff.

The question of the plaintiff's negligence was before the jury, in the manner in which, having regard to the pleadings and the conduct of the trial, it should have been placed before them.

S. 48 raises only a rebuttable presumption, as is shown from its history. The words "by reason of" refer to something more remote than direct causation. The question is whether there was any evidence on which the jury could find that the damage was sustained by reason of the motor vehicle, not whether there was any evidence of negligence.

T. N. Phelan, K.C., in reply.

Cur. adv. vult.

11th December 1942. The judgment of the Court was delivered by

GILLANDERS J.A.: The defendant Brown appeals from a judgment against him for damages arising out of a motor accident. On the afternoon of 23rd March 1940, the plaintiff Fingland, was proceeding in his motor car southerly on highway no. 4, south of the town of Clinton. His motor car was one of five being used to take hockey players from Clinton south to St. Thomas. These cars left Clinton at irregular intervals. About one and one-half miles south of Clinton on the highway, due to heavy snowfalls and the action of snow ploughs, a snow cut existed, about eight rods in length. The snow banks on both sides were quite high, on the west side seven to ten feet, and on the east side four to five feet. The travelled portion between was about seventeen and one-half feet wide and consisted of packed snow below, covered with some loose snow.

Before the accident in which the plaintiff was injured, two cars, with which we are not concerned, had come into collision and blocked this cut near the southerly end. Two of the cars engaged on the same mission as the plaintiff preceded him southerly, and on arriving at the place in the cut where further progress was blocked, they had stopped on the westerly half of the cut. The plaintiff likewise brought his car to a stop on the westerly side of the cut some six to eight feet behind the car ahead of him. A strong wind was blowing in gusts at times, whipping up snow with it so that visibility varied. At times, it is said, when the wind died down a driver could see for four hundred or five hundred yards, and at other times his visibility might be limited to forty or fifty feet.

The defendant Brown, driving his car some little distance behind the plaintiff, came along about a minute after the plaintiff

had stopped, and, not being able to bring his car to a stop behind the plaintiff's car, he turned to the left, ran the left front corner of his car into the snow bank on the east side of the cut and brought his car to a stop facing in a south-easterly direction, with its rear end possibly three to four feet south of the rear of the plaintiff's car. Before stopping, the right rear fender of Brown's car came in contact with the left rear fender of the plaintiff's car, but the impact was not severe and resulted in no damage of consequence.

Upon this happening the plaintiff immediately got out of his car for the purpose of going back and giving warning to any other traffic that might be coming. He had only stepped to a point at the rear of the Brown car when the defendant Garon, also proceeding southerly and not being able, at the speed at which he was driving, to come to a stop behind the plaintiff's car, crashed with considerable force into the rear of the plaintiff's car, the left front fender of his car striking about the centre of the rear of plaintiff's car. The rear end of Garon's car then swung to the east, striking the plaintiff and pinning him between the Garon car and the rear of the Brown car, and resulting in the breaking of a leg and other injuries.

The plaintiff sued both Brown and Garon. The action, was tried by Mr. Justice Greene and a jury, which was asked the following questions, and answered them as follows:

"1. Has the defendant Brown satisfied you that the loss or damage suffered by the plaintiff Fingland did not arise through negligence or improper conduct on the part of the defendant Brown? (Answer Yes or No). No.

"2. Has the defendant Garon satisfied you that the loss or damage suffered by the plaintiff Fingland did not arise through negligence or improper conduct on the part of the defendant Garon? (Answer Yes or No). No.

"3. Was the loss or damage suffered by the plaintiff Fingland caused or contributed to by negligence on the part of the defendant Brown? (Answer Yes or No). Yes.

"4. If the answer to question 3 is 'Yes' what was such negligence? (Answer fully.) Having regard to road conditions, weather and visibility Brown's speed was such that he evidently could not control his car, finally blocking the road when it came to rest on the east side of the highway.

“5. Was the loss or damage suffered by the plaintiff Fingland caused or contributed to by negligence on the part of the defendant Garon? (Answer Yes or No). Yes.

“6. If the answer to question 5 is ‘Yes’ what was such negligence? (Answer fully). Having regard to road conditions, weather and visibility, the speed of the Garon car was such that Garon evidently could not control it, and especially when he came to the part of the road blocked by the Brown car. Garon evidently thought it would do less damage to pull into the right bank.

“7. Was the loss or damage suffered by the plaintiff Fingland caused or contributed to by negligence on the part of the plaintiff Fingland? (Answer Yes or No). No.

“8. If the answer to question 7 is ‘Yes’ what was such negligence? (Answer fully). None.

“9. If you find more than one party to this action guilty of negligence causing or contributing to the loss or damage suffered by the plaintiff Fingland how do you apportion such negligence? A.—

Brown	60%
Garon	40%
Fingland	%
100%	

“10. At what amount do you assess the damages of the plaintiff Fingland? \$5,200.00.”

On the findings of the jury, judgment was entered in favour of the plaintiff against both defendants for the sum of \$5,200 and costs, and as between the defendants they were given relief against each other on the basis of the apportionment of blame found by the jury.

The defendant Brown, in appeal from this judgment, submits:

(1) That the action should have been dismissed as against the appellant either at the close of the plaintiff’s case, or on the answers of the jury, because there was no evidence that any negligence of the appellant was an effective cause, and the blocking of the road by the appellant’s car was only, in the circumstances, a *causa sine qua non*. Further, he contends that the

effective cause of the accident was the act of the defendant Garon which was *novus actus interveniens*.

(2) That in any event a new trial should be directed because of misdirection to the jury.

As to whether there was evidence to support a judgment against the appellant, this Court is not re-trying the case and should be careful not to substitute its own opinion for that of the jury on reasonable evidence. It is limited to ascertaining whether or not there is reasonable evidence to support the jury's findings.

In considering this one should keep in mind what has been indicated as the proper approach. In *Smith v. Harris*, [1939] 3 All E.R. 960, at 964, Scott L.J. says:

"In all these cases, it is necessary to bear in mind what Lord Wright said in the case of *McLean v. Bell* (1932), 147 L.T. 262 at p. 264. I quoted it in a passage in a judgment delivered by myself in *The Eurymedon*, [1938] P. 41 [also reported, *sub nom. Corstar (Owners) v. Eurymedon (Owners)*, [1938] 1 All E.R. 122], and I venture to read that passage because it has, I think, a clear application to the facts before the Court to-day, and expresses the view that I desire to express here. I said, at p. 58:

"I confess to a feeling that much of the litigation which has taken place in the past upon this type of question has arisen through a tendency to substitute a too philosophical analysis of causation for a broad estimate of responsibility in a legal sense. I respectfully agree with a phrase of Lord Wright in *McLean v. Bell* [*supra*], at p. 264, "The decision, however, of the case must turn not simply on causation but on responsibility." When a solution of problems of this type is sought solely in terms of causation, it is difficult to avoid the temptation of concluding that the last act or omission in point of time is of necessity not only the last link in the chain of causation, but the determining factor in the result, since, *ex hypothesi*, but for that last link the result would never have happened. But legal responsibility does not necessarily depend only on the last link.' "

Then after referring to maritime collisions, he quotes an excerpt from the judgment of Lord Wright in *S.S. Heranger (Owners) v. S.S. Diamond (Owners)*; [*The Heranger*] [1939] A.C. 94 at 101, as follows:

"In all these cases of negligence, whether on sea or on land, the decision must be arrived at as a question of fact on

all the circumstances of each case. Cases and precedents may perhaps help sometimes, but they are in truth a very doubtful guide at best in deciding any particular case.”

The observations of Viscount Birkenhead L.C. in the well known case of *Admiralty Commissioners v. S.S. Volute (Owners)*, [1922] 1 A.C. 129 at 144 should also be kept in mind:

“Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the *Bywell Castle* rule [*London Steamboat Company v. Bywell Castle (Owners of)* (1879), 4 P.D. 219], might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution.”

It is clear in this case that the jury considered the blocking of the easterly half of the road by the Brown car to have been the result of Brown’s negligence in not having his car under proper control in the particular circumstances, and that this was an effective cause of the collision. This is a reasonable conclusion and supported by the evidence. It is true that the acts and omissions of Brown and Garon were in sequence, but they are not sufficiently separated in time, place or circumstance for this Court to say that a jury, properly instructed, was not entitled to find the appellant to blame. The appellant called no evidence, and urges that on the evidence tendered by the plaintiff no case is made out. The finding of the jury in respect of the appellant finds sufficient support in the plaintiff’s case.

Objection is taken to the charge of the learned trial judge on several grounds:

That the jury was not properly instructed as to the difference between an effective cause and a *causa sine qua non*, and it is urged that in effect the jury was instructed that if the presence of Brown’s car was a condition or circumstance of the result, the appellant might be found liable. The learned judge told the jury, *inter alia*: “negligence to create liability must be a con-

tributing factor to the accident. Any negligence which did not help to create the accident is not negligence so far as this action is concerned." Following this he clearly explained and illustrated to make clear to the jury that negligence must have a causal connection to create liability. He says later: "Negligence or improper conduct doesn't create liability unless it is one of the factors which produced the accident. . . . None of that creates liability unless it was a factor contributing to the accident." This admonition is repeated subsequently several times in his charge. The word "factor" was, I think, clearly used in its causative sense as meaning one of several causes contributing to a result.

Mr. Phelan further urges that there was misdirection in that the trial judge instructed the jury that as a matter of law the plaintiff was entitled to the benefit of the onus provided by S. 48(1) of The Highway Traffic Act, R.S.O. 1937, c. 288, and that the collisions described in the evidence do not come within the type of collision mentioned in subs. 2 of s. 48, and that "so far as Fingland is concerned, there is a duty on Brown to satisfy you he was not at fault."

Subs. 2 of s. 48 provides:

"This section shall not apply in case of a collision between motor vehicles on the highway nor to an action brought by a passenger in a motor vehicle in respect of any injuries sustained by him while a passenger."

If the plaintiff were suing for personal injuries only, suffered in the circumstances here present, there might be room for argument as to whether the onus rested on the defendants. See *Carter v. Van Camp et al.*; *Van Camp v. Carter and Anderson*, [1930] S.C.R. 156 at 161, [1929] 4 D.L.R. 625. As to the proper conclusion in such circumstances, I express no opinion. However, in addition to his claim for damages for personal injuries, the plaintiff claimed for damage caused to his motor vehicle, and this was apparently an element in the damages awarded. The damage to the plaintiff's motor vehicle resulted from collision with the motor vehicles of one or both of the defendants. In this respect I think it is clear that s. 48(2) applies, and that the onus provision could not apply in the plaintiff's favour.

In these circumstances it remains to consider the effect of the misdirection as to onus. Unless some substantial wrong or

miscarriage of justice has been occasioned by the misdirection a new trial should not be granted. (The Judicature Act, R.S.O. 1937, c. 100, s. 27).

In *Winnipeg Electric Company v. Geel*, [1932] A.C. 690 at 698, [1932] 4 D.L.R. 51, 40 C.R.C. 1, [1932] 3 W.W.R. 49, Lord Wright, discussing a similar provision in another statute, says:

"In their Lordships' opinion the rule applicable in such cases is correctly stated by Turgeon J.A. in a case under similar legislation in Saskatchewan, *Stanley v. National Fruit Company*, 24 Sask. L.R. 137 at 141, [1930] 2 D.L.R. 106, [1929] 3 W.W.R. 522: 'Section 43 of the Act places the onus of proof upon the defendants. This means that the defendants must lose if no evidence of the circumstances of the accident is given at all, or if the evidence leaves the Court in a state of real doubt as to negligence or no negligence, or is so evenly balanced that the Court can come to no sure conclusion as to which of the parties to the accident is to blame. But if evidence for and against is given upon the points in question, the rule in favour of the preponderance of evidence should be applied as in ordinary civil cases, and the statutory onus will cease to be a factor in the case if the Court can come to a definite conclusion one way or the other, after hearing and weighing the whole of the testimony.' "

In *McAuliffe v. Hubbell*, 66 O.L.R. 349 at 354, [1931] 1 D.L.R. 835, Middleton J.A. says:

"I know of no case in which a new trial has been directed because of an erroneous ruling as to onus, when in the result the whole case of both plaintiff and defendant has been fully placed before the jury, and the jury have experienced no difficulty in determining the issue. I do not say that no such case can arise, but clearly the present case does not fall within any exception to the general rule." In considering the application of this statement to the case at bar it should, however, be borne in mind that the appellant called no evidence.

If on the question of liability the jury had only been asked questions 1 and 2, and had answered them in the negative, it might have been impossible to say that such answers were not the result of applying the direction in question and therefore that no substantial wrong or miscarriage had been occasioned. However, by its answers to questions 3 and 4, the jury has not only found affirmatively that negligence of the appellant caused or

contributed to the plaintiff's damages, but has specified and defined the appellant's negligence in clear terms. Considering these answers along with the jury's answer to question 9, in which it places 60 per cent. of the fault on the appellant, I think it cannot be said that the direction in question occasioned any substantial wrong or miscarriage. It seems apparent that the jury was not in doubt and had no difficulty in concluding that the appellant was at fault, and in stating clearly what, in its opinion, that fault was. On the whole case I do not think that in the circumstances any substantial wrong or miscarriage resulted.

It follows that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, respondent: Macdonald and Kennedy, Toronto.

Solicitors for the defendant Brown, appellant: Phelan, Richardson, O'Brien & Phelan, Toronto.

Solicitor for the defendant Garon, respondent: E. L. Haines, Toronto.

[COURT OF APPEAL.]

Darling v. Sun Life Assurance Company of Canada.

Insurance—Life Insurance—Nature of Contract—Proof of Death of Insured—Burden of Proof—Presumption from Seven Years' Absence—Policy Lapsing after Disappearance but before Expiry of Seven-year Period—Effect of Order Presuming Death—Jurisdiction of Court—Limitation of Actions—The Insurance Act, R.S.O. 1937, c. 256, ss. 174, 176.

Semble, a contract of life insurance of the ordinary type is an entire contract, made once for all, subject to termination on the failure of the insured to pay annual premiums. *Quaere*, whether the obligation to pay annual premiums after the first premium is a condition subsequent or a condition precedent.

The jurisdiction of the Court, under s. 174 of The Insurance Act, R.S.O. 1937, c. 256, to make an order presuming the death of an insured, is limited to cases in which the only questions at issue relate to the sufficiency of proof of the maturity of the contract, of the age of the insured, or of the claimant's right to receive the proceeds of the policy. There is no jurisdiction to make such an order where the insurer denies the subsistence of the policy as a valid and binding contract. Nor can an applicant, by an application in a matter in which no such question is raised, bind another insurer who does raise such a question, merely by serving notice of the application upon the second insurer and relying upon the provisions of s. 174(3).

The effect of s. 176 of The Insurance Act, limiting the time within which an action can be brought under a policy of life insurance to six years, is to exclude any action based upon a presumption of death

(which necessarily requires a period of seven years from the disappearance of the insured) unless sufficient premiums have been paid, after the disappearance of the insured, to keep the policy in force until a time within the six years of the institution of the action.

Evidence—Presumptions—Presumption of Death Arising from Seven Years' Absence—No Presumption as to Precise Time of Death.

The rule is well established that while death can be presumed from seven years' absence, in certain circumstances, there is no presumption as to the precise time during that period at which death took place; this must be established, if at all, by positive evidence. *In re Phené's Trusts* (1870), L.R. 5 Ch. 139; *In re Lewes' Trusts* (1871), L.R. 6 Ch. 356; *Lal Chand Marwari v. Mahant Ramrup Gir et al.* (1925), 42 T.L.R. 159, applied. In the present case, *held*, reversing the decision of the trial judge, the evidence was insufficient to justify any finding as to the precise time of death.

AN appeal by the defendant from the judgment of Mackay J., [1942] O.R. 408, [1942] 3 D.L.R. 385, 9 I.L.R. 305. The facts are fully stated in the report of the trial judgment, and in the judgments now reported.

6th October 1942. The appeal was heard by ROBERTSON C.J.O. and McTAGUE and GILLANDERS JJ.A.

H. J. McLaughlin, K.C. (*D. C. Wells*, with him), for the defendant, appellant: There is no justification for finding that death took place at any specific time during the seven-year period without evidence on the point. It is clearly established by all the cases that there is no presumption as to the particular time within the seven years when death took place, and that the onus is upon those who allege death at or before or after any precise time to establish the actual date by positive evidence: *In re Lewes' Trusts* (1871), L.R. 6 Ch. 356. [ROBERTSON C.J.O.: That is well established, but the case you cite was not based on contract. Does the case not resolve itself into the question who is to prove, either that the assured was alive at a particular time, or that he died at a particular time?] It seems clear that the plaintiff must establish the time of death in order to claim the proceeds of the policy. [ROBERTSON C.J.O.: If you can make that clear, that is all that is necessary.]

It is apparent from the automatic non-forfeiture clause that the insurance will lapse after the exhaustion of reserves, which we submit is what happened in this case. [ROBERTSON C.J.O.: Is there no more direct provision in the policy, stipulating that if the premium is not paid, and the days of grace go by, the policy is extinguished?] The policy is stated, on the first page, to be issued in consideration of the payment of premiums in

advance. [GILLANDERS J.A.: S. 139 of The Insurance Act, R.S.O. 1937, c. 256, provides that a policy is void in certain contingencies. I suppose your argument is that this insurance continues only so long as the premiums are paid under the policy?] [ROBERTSON C.J.O.: Is there not a case right on that point? It would seem that it is very important.] Yes, see *Buckingham v. The Prudential Insurance Company of America et al.* (1933), 1 I.L.R. 124. [McTAGUE J.A.: This is all based on the assumption that the policy had lapsed.] We submit that the policy had lapsed by its own terms. [ROBERTSON C.J.O.: Unless it is shown that the assured was alive at some time when a premium came due, then no premium did become due, and the plaintiff starts with a contract in force.] It is only necessary for us to prove that the policy lapsed at a certain time, which we have done. [ROBERTSON C.J.O.: The policy only lapsed if the assured was alive. Is it not essential for you to prove that he was in fact alive?] We submit that there was a valid contract in force until 7th August 1934, and that on that date it lapsed under the automatic non-forfeiture clause. [ROBERTSON C.J.O.: But why stop there? Must you not prove that the assured's life continued after that date? Are you saying that the plaintiff, to succeed, must show that premiums were paid in every year until the actual death?] We submit that on the first page of the policy, where the company agrees to pay \$2,000 to the beneficiary, the agreement is made subject to the receipt and approval, at the company's head office, of proof of the fact and cause of death of the assured and to payment of premiums. That is the contract on which the plaintiff sues. She has shown the end of the currency of the policy contract, but not the death of the assured during its currency, and death is the only maturity of the policy. [McTAGUE J.A.: What is the burden of proof regarding the date of death? Why should it be on the plaintiff rather than the defendant?] The onus is on the plaintiff, in order to prove her case. She must show that the contract was in force at the date of death; otherwise there is no contract in existence. [ROBERTSON C.J.O.: The contract endures until some event occurs, such as the non-payment of a premium accrued during the lifetime of the assured; and the plaintiff claims that here there is no evidence that any premiums accrued in his lifetime. He may have died on 5th December 1932, the day on which he left home. According to

an order of the Court, he is now dead.] Surely the onus is on a person who makes a claim such as the plaintiff's to prove the fact and time of death.

Both the policy and The Insurance Act stipulate that proof of death must be furnished by a claimant before a claim is paid. [ROBERTSON C.J.O.: The continuance of payment of premiums must be most important to insurers. I should have thought that early cases would cover such a situation. On general principles the burden would seem to be on the plaintiff to show that premiums had been paid.] We refer to *Frank v. Sun Life Assurance Company of Canada* (1893), 20 O.A.R. 564, affirmed 23 S.C.R. 152n. Macgillivray on Insurance Law, 2nd ed., p. 366, says: "In all classes of insurance the punctual payment of the renewal premium according to the terms of the policy is a condition precedent to the continuation of the risk." [ROBERTSON C.J.O.: On the same page, Macgillivray, commenting on *The Manufacturers' Life Insurance Co. v. Gordon* (1893), 20 O.A.R. 309, says that the law is uncertain, since two judges in that case decided one way, and two another. In England a contract of life insurance is treated as a contract for a year, renewable yearly, but in the United States it is regarded as one for life, subject to forfeiture on non-payment of premiums.] We submit that the division of opinion in the *Gordon* case does not affect us, because here the termination and lapse of the policy is fully provided for by the contract, and the effect of payment within the days of grace is not in issue, as it was there. In our case, nobody knows when the assured died, if in fact he is dead; therefore there is no proof of the maturity of this policy, which is a condition precedent, clearly set forth in the policy, to be fulfilled before any proceeds are payable to the beneficiary.

S. 171 of The Insurance Act entitles us to proof of the maturity of the contract, which is entirely lacking, and the action should have been dismissed on the ground that statutory requirements regarding proofs of death had not been complied with: *Somerville v. Aetna Life Insurance Co. of Hartford* (1910), 21 O.L.R. 276; *O'Donnell v. North American Life Assurance Co.*, 60 O.L.R. 502, at 508-9, [1927] 3 D.L.R. 412.

The order of the Court declared that the assured was dead on 5th September 1940, but this was more than six years after the lapse of the policy, which occurred on 7th August 1934.

S. 174 of The Insurance Act protects claimants against having to pay premiums indefinitely, and if the assured is absent and unheard of for seven years the beneficiary's obligation to continue paying premiums, perhaps even after the death of the assured, may be terminated. Because of this provision in s. 174, an addition to s. 176 was necessary. In disappearance cases, the actual date of death is unknown, but if the policy is still in force when an order is made presuming death, under s. 174, eighteen months are allowed after the making of that order for the bringing of an action if the insurer does not pay. Here, the trial judge inferred that the assured died at some time between 5th December 1932 and 7th August 1934. Even accepting this inference, and putting the time of death at the latest possible date, this action was not brought until more than six years after the death. If the plaintiff were to succeed in her present contention, the result would be that in all disappearance cases the beneficiary would be entitled to recover under a policy of insurance, whether or not there was any evidence as to the time of death.

H. L. Cartwright, for the plaintiff, respondent: The trial judge found as a fact that the assured died shortly after his disappearance. The burden of proof thereupon shifted to the defendant, and the burden of adducing further evidence rests with it: 13 Halsbury, 2nd ed., p. 543, paras. 612-613. It is sufficient that the plaintiff has proved that a policy existed and that death occurred. [GILLANDERS J.A.: Do you not have to prove that there was a subsisting contract?] [McTAGUE J.A.: This is an action by a beneficiary who is not a party to the contract, and who is entitled only upon the happening of certain events. Is not the onus on that beneficiary to establish that there is a subsisting contract and that the event insured against has happened?] If the defence of lapse is struck out of the defendant's pleadings, then the plaintiff is entitled to succeed, and this fact brings her within the rule laid down in the passage cited above from Halsbury. The trial judge has found the time of death as a fact, and cites *Hickman v. Upsall* (1876), 4 Ch. D. 144. Further, we are within the exception provided for in s. 176(2) of The Insurance Act. [ROBERTSON C.J.O.: If you are relying on the trial judge's finding as to the time of death, the appellant's counsel says that s. 176(2) is not applicable.] I submit that we are governed by s. 174(3). [ROBERTSON C.J.O.:

But does that not apply only to a case where no other issue is involved? You must rely either on the order based upon the presumption, or on the finding made by the trial judge that the assured died shortly after his disappearance.] The section does not limit us. There might be a question raised as to whether the trial judge erred in making the inference. S. 176(2) applies in any case "where an order has been made declaring that death is presumed from the fact that the person whose life is insured has not been heard of for seven years". These words are plain and unambiguous, and the appellant should not attempt to limit them by implying a condition that the order must be the only evidence of the fact and time of death. [ROBERTSON C.J.O.: But that is not your case, or what you are trying to prove. Presumption and inference are two very different things. The effective part of the policy says that the proceeds will be paid upon receipt of proof of death.] The onus of adducing further evidence is on the defendant, and it must show that the assured made default, which can be proved only by showing that he was alive and failed to pay a premium when it came due. *Buckingham v. The Prudential Insurance Company of America et al.* (1933), 1 I.L.R. 124, is distinguishable, since it is based upon certain sections of the Quebec Civil Code. The plaintiff relies upon presumption to prove the fact of death and upon inference to prove the time. [McTAGUE J.A.: How can you prove the time without proving the fact?] It is not necessary to prove beyond a reasonable doubt what was the time of death.

We are clearly within the limitation sections, since the only condition for the applicability of s. 176(2) is that an order should have been made presuming death.

H. J. McLaughlin, K.C., in reply.

Cur. adv. vult.

10th December 1942. ROBERTSON C.J.O.: The facts of this case are fully set forth in the reasons for judgment of the learned trial judge, and it will be necessary therefore to repeat only such facts as are required to make my own reasons clear.

The assured, Charles F. Darling, disappeared on 5th December 1932. He has not been heard of since, and his disappearance and subsequent absence are not explained. At the time of his disappearance there were current two policies of insurance on his life. One policy was issued by The Manufacturers Life In-

surance Company and was for \$5,000. The other policy was issued by appellant and was for \$2,000. The premiums on the former policy were paid by respondent, or by some one on her behalf, after the disappearance of the assured, and that policy was kept in good standing until an order was made on 5th September 1940, under s. 174 of The Insurance Act (R.S.O. 1937, c. 256), declaring that a presumption had been established of the death of the assured, and declaring the respondent entitled to be paid the net proceeds of the policy. No premiums were paid on the policy issued by appellant after the disappearance of the assured.

Appellant's policy was issued on 8th April 1926, "in consideration of the payment in advance of a premium of \$67.60 on the first day of April 1926 and of the payment of a like amount yearly thereafter on the first day of April in every year during the continuance of this policy." The policy contained the following clause:—

"II. DAYS OF GRACE.—Thirty days of grace are allowed for the payment of renewal premiums, without interest charge, during which time the assurance shall continue in full force. If any premium be not paid within the days of grace this policy shall thereupon become void, subject, however, to the nonforfeiture provision of Privilege IX hereunder."

The policy contained what is called an "Automatic Nonforfeiture Clause", which provided that if at the time of nonpayment of any premium after the policy had been two full years in force, the reserve on the policy calculated on a specified basis, or the balance of the reserve after deducting any indebtedness and certain charges, should exceed the amount of the said premium, the policy should not lapse, and the amount of the premium would be advanced as a loan. As soon as the indebtedness, with interest thereon and other charges, equalled the reserve, it was agreed that the policy should immediately lapse and become void and of no effect, without any action whatever on the part of the company. It is in evidence and is not disputed, that notwithstanding the non-payment of any premiums after the assured disappeared on 5th December 1932, the reserve on the policy was sufficient to carry it until 7th August 1934, and that if the assured was still living on that date the policy then lapsed.

The learned trial judge was of opinion that there was evidence before him that justified him in inferring that the assured

died before the 7th August 1934, "the day on which the automatic non-forfeiture clause ceased to operate." With respect, I am unable to agree with the learned trial judge in that respect. I agree that there is evidence sufficient to support the presumption that the assured is dead, but in my opinion the evidence does not warrant a finding that he died on or before any specific date within the period after his disappearance and before the order or judgment declaring that the presumption of death has arisen.

Two principal questions seem to me to arise on this appeal, (1) Does respondent's case fail because of the non-payment of the annual premiums during the period after disappearance of the assured? and (2) Is respondent's action barred by the limitation provisions of The Insurance Act? The first of these questions could be stated in more than one way, and I do not intend to narrow the issue by the manner of stating it.

It will be convenient, in the first place, to consider the nature of an insurance contract such as this. There has been some difference of judicial opinion as to whether a contract of the general character of the contract in this case is a contract for one year, renewable annually at the option of the assured, or whether it is a contract made to cover the whole period of the lifetime of the assured, conditional upon payment of the annual premiums. There is a discussion of the question and some of the cases are cited in Macgillivray on Insurance Law, 2nd ed., pp. 365 and 366. In *In re Anchor Assurance Company* (1870), L.R. 5 Ch. 632 at p. 638, Lord Hatherley L.C. said, "A policy of insurance is not exactly a new contract every year, but is a contract made once for all with a condition to be performed *de anno in annum*, and if the condition is not performed in any year the contract is at an end." It is to be noted that while the insurance contract now in question is expressly made in consideration of the payment in advance of the first premium and of the payment of a like amount yearly thereafter on a named date "in every year during the continuance of this policy", and the assured by his application, which is incorporated in the contract, agrees to pay the first premium, he makes no promise or agreement to pay any premium after the first. The agreed consequence of non-payment of an annual premium when due is that the policy thereupon becomes void, subject only to the days of grace and to the non-forfeiture provision.

While, therefore, this is a contract "made once for all", to use Lord Hatherley's expression, the continuance of the contract from year to year is really at the option of the assured and is conditional upon his payment of the annual premium. No presumption of any kind arises that the assured in this case did pay to appellant any premium after his disappearance. In fact it is essential to respondent's case that the assured has not been heard of since 5th December 1932, and at that date there was a debt against the policy. While I am not aware that respondent has made any admission in respect to the matter, it is really not in dispute that nothing was paid to appellant by way of premium or otherwise in respect of this policy after the assured disappeared.

In these circumstances appellant contends that respondent has made no case on the policy without having proved that the policy was continued in force until its maturity on the death of the assured—in other words, that to succeed respondent must prove affirmatively that the assured died on or before 7th August 1934, when the automatic non-forfeiture clause ceased to operate. Respondent says that there is no such burden upon her, and that unless appellant can prove affirmatively that the assured was alive after 7th August 1934, it cannot be said that the policy lapsed for non-payment of any premium.

The result of the evidence is to raise a presumption that the assured is dead, but at what time he died cannot be determined on the evidence. This is the rule as laid down in the case of *In re Phené's Trusts* (1870), L.R. 5 Ch. 139 and *In re Lewes' Trusts* (1871), L.R. 6 Ch. 356. In the former case the rule was stated in the following terms:—"If a person has not been heard of for seven years, there is a presumption of law that he is dead; but at what time within that period he died is not a matter of presumption, but of evidence, and the *onus* of proving that the death took place at any particular time within the seven years lies upon the person who claims a right, to the establishment of which that fact is essential."

This statement of the rule is made the subject of a minor criticism by the Privy Council in the Indian appeal of *Lal Chand Marwari v. Mahant Ramrup Gir et al.* (1925), 42 T.L.R. 159, where it is also stated that on this matter there is no difference between the law of India and the law of England. Lord Blanes-

burgh, after quoting the passage I have quoted from *In re Phené's Trusts*, prodeeded: "Following these words it is constantly assumed—not perhaps unnaturally—that when the period of disappearance exceeds seven years, death, which may not be presumed at any time during the period of seven years, may be presumed to have taken place at its close. This, of course, is not so. The presumption is the same if the period exceeds seven years. The period is one and continuous, though it may be divisible into three or even four periods of seven years. Probably the true rule would be less liable to be missed, and would itself be stated more accurately, if, instead of speaking of a person who had not been heard of for seven years, it described the period of disappearance as one 'of not less than seven years.' " I refer to the India case, however, for its approval of the general statement of the rule as found in the earlier case, rather than for its amended statement of the rule as it applies in cases where the period of disappearance exceeds seven years. The fact that in the present case the time elapsed since disappearance of the assured somewhat exceeded seven years is not important, so far as the presumption of death is concerned.

The presumption that properly may be made in this case is that the assured is dead, but there is neither proof nor presumption that he died at one time and not at another time after his disappearance. If the burden was on the respondent here to prove that the assured died while the insurance contract was a subsisting and binding contract, she has not proved it and her action must fail. If, on the other hand, the burden was on the appellant to prove that the insurance contract had become void because of the non-payment of a premium that came due after assured's disappearance, the appellant has not satisfied that burden, for it has not proved that the assured was still alive when any such premium would have come due had he then been alive.

To determine where the burden of proof lay in this case is not a simple matter. The question would seem to be reducible to this—was it necessary to the respondent's case that she should not only prove the making of the contract which was the basis of her action, but also prove the continuance of the contract until its maturity on the death of the assured, whenever that event occurred? The answer to this question must turn largely,

if not wholly, upon the terms of the contract and its proper interpretation.

Commonly, the matter has been considered in the reported cases that I have found, from the standpoint that the requirement of punctual payment of the premium, whether annually, or quarterly or monthly as the case may be, with a provision, express or implied, for forfeiture of the contract on default in payment, is a condition of the contract, and the question of who has the burden of proof has turned upon whether in the particular case, the condition was considered a condition precedent or a condition subsequent. It has been suggested, however, by at least one textwriter, that the provisions of an insurance contract as to the payment of premiums and the consequence of non-payment, may be such that they are not properly regarded as a condition at all, and that may be so in the contract now in question. A contract of life insurance, notwithstanding that it is a contract "made once for all", may be a contract by which the obligation of the assurer is expressly limited to death within a definite term of years. Another common form of life insurance contract is one that while intended to be effective throughout the lifetime of the assured, however long that may be, limits the requirement as to payment of premiums to a definite term of years. While the contract here in question does not limit either the period of the assurer's obligation or the requirement as to payment of premiums to any definite term of years, it does expressly and effectively, by its terms, limit the assurer's obligation to the period for which the premiums are paid. The assured does not bind himself to pay any premium after the first, but the provisions of the contract are clear that he will continue to have insurance only as he continues to pay for it. By express words the payment of the annual premiums is tied up with "the continuance of the policy", and is made the measure of that continuance. Days of grace and the operation of the automatic non-forfeiture clause add something to the single year for which each premium is paid, but the premiums paid are made the basis for the continuance of the policy. Viewed from this standpoint it would seem to be a necessary part of respondent's case to show the payment of any premiums necessary to be paid to continue the insurance contract until its maturity by the death of the assured at whatever time that event may have occurred.

If the construction I have suggested is not the proper one, and the provisions as to payment of annual premiums and as to the consequence of non-payment, constitute a condition, judicial opinion as recorded in reported cases seems to be much divided upon the question whether the condition is precedent or subsequent. In *Frank v. Sun Life Assurance Company of Canada* (1893), 20 O.A.R. 564, the payment of the stipulated premiums was said to be a condition precedent to the continuance of the insurance. The judgment in that case was affirmed in the Supreme Court of Canada (23 S.C.R. 152, note). The facts of the case were that the first annual premium was not paid in cash, but the assured gave the company two instruments in the form of promissory notes, payable at 90 days and at 180 days respectively, each containing a provision that if it should not be paid when due the insurance policy should be void. The policy itself contained no provision for forfeiture on non-payment of any premium. The note first to accrue due was not paid when due, and while it was still unpaid and before maturity of the second note, the assured died. It was held that the contract of insurance came to an end on non-payment of the first note at maturity, and that without any election or declaration of forfeiture by the company. Burton J.A. said, at p. 567, that an express condition that the policy shall be void on default in payment is wholly unnecessary "the punctual payment of every part of the premium being a condition precedent to the liability of the company." Osler J.A. said at p. 569: "Upon the true construction of the terms of the policy I am of opinion that it is made a condition of its coming into existence as a binding contract with the applicant and of its continuance as such that the first and successive premiums shall, as to the first be paid before it comes into force, and as (to) the latter shall be paid at the day stipulated for payment in each successive year." Maclellan J.A. at p. 572, said: "It is clear, therefore, that the payment of the premiums which are the consideration for the defendants' covenant is a condition precedent, and the plaintiff cannot recover without averring and proving that the payments were duly made, or some sufficient legal excuse for the omission." Hagarty C.J.O. dissented "with very considerable doubt and hesitation." He considered that the notes must be taken to have been accepted as payment of the first premium, and that the policy had become binding.

The facts in the case of *Frank v. Sun Life Assurance Company of Canada* are not the facts of this case, nor was the precise point for decision the same, but the dicta of the majority of the judges are relevant here. I have not found, and we were not referred to, any English or Canadian case where the question of the burden of proof that arises here has been directly in issue. There are many cases to be found in American reports that deal with the question whether a provision that failure to make prompt payment of the premiums, after the first, shall avoid the policy, is a condition precedent or a condition subsequent. There are decisions each way. Reference may be made to Joyce on The Law of Insurance, 2nd ed., s. 1099, and to the cases cited. An important decision is that of the Supreme Court of the United States in *New York Life Insurance Company v. Statham et al.* (1876), 93 U.S. 24. That case was not concerned with the burden of proof, but the nature of the contract of life insurance is discussed, and the operation of an implied condition for forfeiture is considered. Perhaps none of these decisions is particularly useful in the determination of the question that arises here. If the provisions of the contract as to the payment of premiums after the first, and as to the consequence of non-payment, are to be regarded as constituting punctual payment a condition, it may truly be said that it is a condition subsequent in the sense that its performance is not called for until after the contract has come into force, and a breach operates to avoid a contract that had been validly made. On the other hand, payment of future premiums is just as truly a condition precedent to the continuance of the policy after the period covered by the first premium. Such payment is an act required to be performed by the assured before the company can be required to continue to insure him under the contract.

In the present case, respondent having, at the trial, put in the policy, which showed that by its express terms it was not an insurance that continued, except upon the payment of annual premiums, until its maturity on the death of the assured, there is much to be said for the view that it was necessary for respondent to go further and to prove that the premiums that were paid were in fact sufficient to continue the policy in force until its maturity, because she is not entitled to call upon appellant for performance unless that had been done. I should be prepared to rest a judgment for appellant upon that ground alone, if

necessary, but, in my opinion, the operation of the limitation provisions of The Insurance Act puts appellant in an even stronger position.

Before proceeding to deal with the second question, I should make some reference to the pleadings and to the course of the trial. The burden of proof may be affected by either or both.

Reading the pleadings, without having regard to the rules that govern them, it may seem that appellant took upon itself the burden of establishing the lapse of the policy. The statement of claim contains no allegation of the payment of premiums and this was not objected to, while the statement of defence asserts the lapse of the policy by reason of the non-payment of premiums. Consol. Rule 146 has a direct bearing on both pleadings. It is as follows:

“Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the party relying thereon, and an averment of the performance or occurrence of all conditions precedent necessary for the case by the plaintiff or defendant shall be implied in his pleading.”

This rule made it unnecessary that respondent should plead payment of premiums, if such payment was a condition precedent performance of which was necessary to her case, but, on the other hand, required that appellant should specify the requirement of the contract in that respect, if it intended to contest performance. (See *Sentinel-Review Company Limited v. Robinson et al.*, [1928] S.C.R. 258, [1928] 3 D.L.R. 97). Rule 142 also bears upon the matter. It requires a defendant to set forth the facts upon which he relies, even though this may involve the assertion of a negative. The appellant might, no doubt, have so framed its pleading that it would not have appeared, even in form, to allege affirmatively the lapse of the contract, but would merely have denied the payment of premiums necessary to its continued existence. I was at first more concerned about the possible effect of the manner in which, on the close of the respondent's case, the appellant set out to prove the lapse of the policy instead of insisting upon respondent's failure to prove her case by showing that the insurance contract was still in force at the death of the assured. It seems plain, however, from the record that, throughout, the trial was con-

ducted with a full understanding by both counsel, and by the trial judge as well, that each side contended that the burden of proof was on the other. While respondent's counsel was opening the case the trial judge commented, "The question of onus will come into this." Respondent's counsel proceeded, "And that will be a rather difficult point for your Lordship to decide; but my contention will be that once I have proved the policy in existence at the time of his disappearance, and proved the death—and I do not care whether I prove it through this order, as I am entitled to do, I think, or through the fact that he is now absent seven years—in either case I have proved the death, and my submission is that at that stage the onus will shift to the defence to prove that he died at some time before they claim to have lapsed the policy". The concluding statement, no doubt, as reported, is the reverse of what was meant.

At a later stage, but still before the close of respondent's case, appellant's counsel, during a discussion of the admissibility of certain evidence, said, "My learned friend has to prove the death of the man in a certain period." It would appear from the record as a whole that while appellant's counsel was not at all times on his guard not to even appear to assume the burden of proving the lapse of the policy, yet the substantial contention of each was at all times fully understood by the other. It would seem to be a case where it can be said with assurance that no one was led by the conduct of the other into omitting any evidence he had that would support his case, and that all the evidence that respondent had to offer was put in by her. After due consideration, therefore, I have concluded that neither the form nor contents of the pleadings, nor the course of the trial, can be said to affect the question of the burden of proof.

S. 176 of The Insurance Act provides in subs. 1 that any action or proceeding against the insurer for the recovery of insurance money shall be commenced within one year next after the furnishing of reasonably sufficient proof of the maturity of the contract and of the right of the claimant to receive payment, or within six years next after the maturity of the contract, whichever period shall first expire, but not afterwards. This action was commenced on 16th November 1940. It is not disputed that the policy in question ceased to be a valid obligation on 7th August 1934, unless it had then matured by the

death of the assured. Doubtless the appellant cannot prove that the assured had died and the policy had matured on or before that date, but appellant can assert with certainty that the assured either was dead by that date, or had ceased to be insured by this policy. Respondent cannot, in the same action, succeed in establishing a cause of action that could have no existence if it did not arise at a date earlier than six years before the commencement of the action, and also be heard to say that it has not been established that the cause of action arose more than six years before the action was commenced.

That, however, is not the position respondent endeavoured to take. The first subsection of s. 176, to which I have referred, is made expressly subject to subss. 2 to 4. It is provided by subs. 2 that when an order has been made declaring that death is presumed from the fact that the person whose life is insured has not been heard of for seven years, an action or proceeding shall be commenced within one year and six months from the date of the order, but not afterwards. Respondent says that such an order was made here by Roach J. on 5th September 1940, and that the provisions of subs. 1 have no application.

Provision is made by s. 174 of The Insurance Act for making an application to the Court, before or after action brought, for a declaration as to the presumption of death. As appellant contends that it is not affected by the order of Roach J., it is necessary to consider the statute and the proceedings taken under it. S. 174 is as follows:—

“174—(1) Where the insurer admits the validity of the contract but does not admit the sufficiency of the proof furnished by the claimant of the maturity of the contract, or of the age of the person whose life is insured, or of the right of the claimant to receive payment of the insurance money, and where there is no other question in issue, except a question under subsection 2, the insurer or the claimant may, before or after action brought, upon at least thirty days' notice apply to the Court for a declaration as to the sufficiency of the proof furnished, and the Court may direct what further proof shall be furnished, or in special circumstances, may dispense with further proof.

“(2) Where the claimant alleges that the person whose life is insured is presumed to be dead by reason of his not having been heard of for seven years, and where there is no other ques-

tion in issue except a question under subsection 1, the insurer or the claimant may, before or after action brought, upon at least thirty days' notice, apply to the Court for a declaration as to the presumption of death.

"(3) If the Court finds that the proof of the maturity of the contract or of the age of the person whose life is insured or of the right of the claimant to receive payment is sufficient, or that a presumption of death has been established, or makes an order directing what further proof shall be furnished or in special circumstances dispensing with further proof, the finding or order of the Court shall, subject to appeal, be conclusive and binding upon the applicant and all parties notified of the application and the Court may make such order as to the payment of the insurance money and as to the costs as to it may seem just.

"(4) The payment by the insurer in accordance with the order shall discharge it from liability in respect of such payment."

I do not quote subss. 5 and 6. The former deals with cases where the proof is not found sufficient, and provides that the Court may give directions as to what further shall be done. Subs. 6 merely provides that the application shall operate as a stay of any pending action unless otherwise ordered.

Respondent, on 12th June 1940, applied to Fisher J.A. for an order declaring that the assured be presumed to be dead. The application was made in the matter of Charles Festus Darling, The Manufacturers Life Insurance Company and the appellant. Notice of the application was served upon the two insurance companies, and they appeared by counsel. Fisher J.A. made an order directing that certain advertising be done, and that affidavits be obtained from certain of the assured's relatives, and adjourned the application to permit of these things being done. The motion was brought on again before Roach J. on 5th September 1940, in presence of counsel for the two insurance companies, when an order was made declaring that a presumption of death of the assured had been established and that he is now presumed to be dead. The order further declared that the applicant, the beneficiary in the policy of The Manufacturers Life Insurance Company, was entitled to be paid the net proceeds of that policy, less certain costs of that company, and that

upon payment the company be discharged from all liability. That company was awarded its costs of the application, but no order was made as to costs of appellant.

This order was filed as an exhibit at the trial of this action by respondent, but evidently she was not prepared to rely wholly upon it for the presumption of death, for respondent called as witnesses most, if not all, of the persons whose affidavits had been used upon the motion, and examined them in detail as to any matters within their knowledge relating to the disappearance of the assured and the efforts to find him and anything else that might throw light upon his absence. No doubt she then made out a case for a presumption of death quite independently of the order of Roach J. In truth, it would seem that the only use respondent seeks to make of the order, so far as appellant is concerned, is as a means of avoiding the application of subs. 1 of s. 176 to this case.

I am quite unable to see how the order can affect appellant in any way. So far as appellant was concerned, s. 174 did not warrant, in my opinion, any application to the Court. S. 174 gives the Court a special jurisdiction quite outside its ordinary jurisdiction, and the conditions under which it may be exercised are strictly limited by the section. The Court can entertain an application for a declaration of presumption of death under subs. 2 of s. 174 only when there is no other question in issue except a question under subs. 1, that is, a question as to the sufficiency of the proof furnished of maturity of the contract, or of the age of the assured, or of the claimant's right to receive payment of the insurance money. Here there was in issue the vital question whether the policy had lapsed for non-payment of premiums. In paragraph 2 of respondent's reply in this action is the following admission:

"The plaintiff admits that the defendant has constantly taken the position that the policy sued upon herein lapsed because of non-payments of premiums on the 7th day of August, 1934. The plaintiff, however, submits that the defendant has at no time questioned the validity of the said policy."

While the order of Roach J. says nothing about it, appellant's counsel stated on the argument of this appeal that the position taken by his clients was made plain on the application, and this statement is not challenged. No doubt it was because of

the position taken before him by appellant that Roach J. made no order in regard to appellant, such as was made in regard to the other insurance company. In these circumstances the order of Roach J. can have no effect, whether by way of estoppel or otherwise, upon appellant's position. As was said by Lord Hobhouse in *Attorney General for Trinidad and Tobago v. Eriché et al.*, [1893] A.C. 518 at p. 522, "It is hardly necessary to refer at length to authorities for the elementary principle that in order to establish the plea of *res judicata* the judgment relied on must have been pronounced by a Court having concurrent or exclusive jurisdiction directly upon the point." See also *Toronto Railway Company v. The City of Toronto*, [1904] A.C. 809 at 815, and *Commissioners of Inland Revenue v. Sneath*, [1932] 2 K.B. 362 at 381.

It is said, however, by respondent that subs. 3 directs that the order "shall, subject to appeal, be conclusive and binding upon the applicant and all parties notified of the application", and that appellant was a party so notified. That seems to be equivalent to saying that while respondent could not make an application in the case of the appellant company because it raised an issue that excluded the Court's jurisdiction, yet, having made an application in the case of another company that raised no such issue, it was proper to notify appellant of that other application, and, thereupon, appellant would be bound by whatever order was made. That, of course, is not what respondent did. The application was made in the matter of appellant, as well as in the matter of the Manufacturers company. The whole argument based upon the order of Roach J. seems to me to be based upon a misconception of the purpose of s. 174. It is enacted to provide a speedy and inexpensive way of disposing of questions that prevent an insurance company paying a claim with safety where the questions are usually of a comparatively simple character, and there is no question of the existence of a valid contract. The statute contemplates that upon determining the question or questions that it authorizes to be submitted, the Court may, without more, order payment. The purpose and scope of the provision in subs. 3 making the order conclusive and binding upon all parties notified of the application, is more readily seen by the history of subss. 1, 2 and 3. They were enacted in their present form in 1935 (25 Geo. V., c. 29, s. 26). As it read formerly, subs. 2 authorized only the assurer to apply

for a declaration of the presumption of death, but subs. 3 contained then, as it does now, words that made the order binding upon all parties notified of the application. It is obviously necessary for the effective protection of an insurance company acting under the order, that all persons who might have claims upon the policy or upon the insurance money should be bound. It was never contemplated that a claimant might make use of this provision to tie up an insurance company as to which no application could be made directly. It would be just as logical to apply the order to interests in some estate that might arise under a will or trust upon the death of the person assured, and to bind by notice of the application persons who might claim rights in them.

Disregarding, therefore, as I think we must, the order of Roach, J. as having any effective relation to appellant and its policy, the result would appear to be that if respondent ever had a good cause of action under the policy, it has been barred by the provisions of s. 176(1). With a period of limitation of only six years computed from the death of the assured, and a period of at least seven years from his disappearance, necessary to raise a presumption of death, the situation that arises here is inevitable unless sufficient premiums have been paid to keep the policy in good standing for at least some part of the period of disappearance, as this respondent in fact did with the \$5,000 policy of the Manufacturers company. In my opinion respondent is on the horns of a dilemma: either the policy did not mature within the time for which it was kept in good standing, and it became a lapsed policy, or it matured so long before action was commenced that the claim is barred by s. 176(1) of The Insurance Act.

The appeal should be allowed and the action dismissed. As to costs, as the principles of law involved are not well settled, I would award no costs against respondent, so far as the proceedings down to and including the trial are concerned. Appellant should have its costs of the appeal.

McTAGUE J.A.: I may say that after the appeal had been heard I was inclined to the view that it must fail. What concerned me most was the effect of the order of Roach J. dated 5th September 1940. If it was an order binding upon the appellant as to declaration of presumption of death, then it seemed

to me that the onus of proof was shifted from the respondent, because the appellant must have been taken to have admitted the validity of the policy as at the date of the order.

The order of Roach J., as I have come finally to construe it, declared, with respect to The Manufacturers Life Insurance Company, that a presumption of death had been established, and that the applicant was entitled to be paid the net proceeds of the policy after deduction of fixed costs. As to the Sun Life Assurance Company of Canada the order is silent, except that the company is denied any costs.

Having in mind the limited jurisdiction of the Court under s. 174, I do not see how it could be construed otherwise without assuming that the Court had taken to itself jurisdiction not given by the statute. In other words I do not think the order has any binding effect upon the Sun Life Assurance Company of Canada in this action.

The learned trial judge appears to have decided the case on two grounds; first, that the onus of proving that the insured was alive until the 7th day of August 1934 was on the defendant, and the defendant had not satisfied such onus; and, second, that a reasonable inference from the evidence produced on behalf of the plaintiff was that the insured had died before 7th August 1934.

With the finding of fact I must, with respect, disagree. In my opinion the evidence does not justify any such finding. The circumstances and surrounding evidence of character and tendencies of the insured are equally consistent with death either before or after the important date. In other words, I can find no evidence of sufficient weight pointing to the insured's death prior to August 1934 to justify such a finding and tip the balance. I have read the various cases relied upon by the learned trial judge as supporting his finding of fact, and with all respect cannot conclude that they are applicable to this case. In *Hickman v. Upsall* (1876), 4 Ch. D. 144; in *In re Benjamin, Neville v. Benjamin*, [1902] 1 Ch. 723; in *Danby v. Danby* (1859), 5 Jur. N.S. (Pt. I) 54; in *In the Goods of Matthews*, [1898] P. 17, there was evidence of health or age or some such circumstance as failure to claim money due which was very cogent in justifying a finding. I can find no such evidence in the case at bar. It seems to me that *In re Phené's Trusts* (1870), L.R. 5 Ch. 139, and *In*

re Lewes' Trusts (1871), L.R. 6 Ch. 356, which have been followed more than once in this Court, lay down the correct law—that the *time* of death within the period following disappearance is not a matter of presumption but must be proved by positive evidence. For an explanation of the principle see *Lal Chand Marwari v. Mahant Ramrup Gir et al.* (1925), 42 T.L.R. 159. In the case at bar, I do not think the evidence is cogent enough to support the learned trial judge's finding.

On the question of where lies the onus, it is a matter of some importance to consider the nature of a life insurance contract. I except from this consideration term insurance, which is not involved in this case. In *The Manufacturers' Life Insurance Co. v. Gordon* (1893), 20 O.A.R. 309, a court of four appears to have been divided equally upon the question whether a life policy was an insurance continuing for life until forfeiture, or an annual insurance from year to year. In *Pritchard v. The Merchant's and Tradesman's Mutual Life-Assurance Society* (1858), 3 C.B. (N.S.) 622, 140 E.R. 885, Willes J. expressed the opinion that the contract is an annual contract with the privilege of renewal. Doubt is cast upon this dictum of Willes J. in *Stuart v. Freeman*, [1903] 1 K.B. 47. In *New York Life Insurance Company v. Statham et al.* (1876), 93 U.S. 24, it was held by the United States Supreme Court that a life policy is not an insurance for a single year with a privilege of renewal from year to year by paying the annual premium, but is an entire contract of insurance for life, subject to discontinuance or forfeiture for non-payment of any of the stipulated premiums. The reasoning of Bradley J. commends itself strongly to me, and in my view the theory of entire contract for life, subject to defeasance, is much more consistent with present-day automatic non-forfeiture clauses as well as with various sections in The Insurance Act, *e.g.*, ss. 140 and 141. Accordingly, I adopt the view of the United States Supreme Court in *New York Life v. Statham*. For a general discussion of the subject see Macgillivray on Insurance Law, 2nd ed., pp. 365 and 366.

With the order of Roach J. ruled out as affecting the matter of onus in any way, I find myself in agreement with my Lord the Chief Justice that there was an onus on the respondent not only to prove the policy but to go further and prove that the premiums that were paid were sufficient to continue the policy

in force until its maturity. Only after establishing that was she entitled to call upon the appellant for payment.

I am also in accord with my Lord as to the effect of the limitation sections of The Insurance Act, because the order of Roach J., I think, in so far as the appellant is concerned, cannot be invoked to bring into effect subs. 2 of s. 176.

Accordingly, I think the appeal should be allowed and the costs dealt with as proposed by my Lord.

GILLANDERS J.A.: I am in agreement with both the reasons and the conclusion of my Lord the Chief Justice and my brother McTague and have nothing further to add.

Appeal allowed with costs; action dismissed without costs.

Solicitors for the plaintiff, respondent: Cartwright & Cartwright, Kingston.

Solicitors for the defendant, appellant: McLaughlin, Johnston, Moorhead & Macaulay, Toronto.

[ROSE C.J.H.C.]

[COURT OF APPEAL.]

Hebrew National Association v. Kramer.

Arbitration—Submission and Award—Setting Aside Award—What Matters to be Considered—Questions of Law and Fact—Notice in Case of Dismissal of Employee—The Arbitration Act, R.S.O. 1937, c. 109.

Master and Servant — Dismissal — Reasonableness and Sufficiency of Notice—Question of Fact.

A discharged employee and his former employer referred to arbitration "all matters in dispute between us". The arbitrators, having stated in a letter that they proposed to limit their consideration to the employee's "claim for improper dismissal", made an award in which they found that the hiring was on a weekly, and not on a yearly basis, but that, in all the circumstances, the employee was entitled "in good conscience" to receive an amount greater than the two weeks' salary which had been paid to him. The employer moved to set aside the award, on the ground of error in law appearing on its face.

Held, by Rose C.J.H.C., if all that had been submitted to the arbitrators was the legal right of the employee to damages for wrongful dismissal, and if it had appeared that the arbitrators had awarded an amount greater than the employee could have recovered in a court of law on the termination of a contract on a weekly basis, the motion must have succeeded. But the submission was not expressly defined, and there was nothing to indicate that the parties had not submitted the employee's equitable, as distinguished from his purely legal, rights. The Court could not ascertain the nature of the "disputes" which had been submitted without considering the evidence, which, under such cases as *Re Grant v. Eastwood* (1875), 22 Gr. 563, it was not entitled to do. The motion must therefore be dismissed.

Held, by the Court of Appeal, assuming that the arbitrators, in the absence of an express provision to the contrary in the submission, were limited to a consideration of the legal rights of the parties (Russell on Arbitration and Award, 13th ed., p. 332; *Jager v. Tolme & Runge et al.*, [1916] 1 K.B. 939, referred to), the question in respect of which error was alleged was not one of law but one of fact. In the absence of custom or agreement, an employee was entitled to reasonable notice was a question of fact. *Payzu, Limited v. Hannaford*, [1918] 2 K.B. 348; *Carter v. Bell & Sons (Canada) Ltd.*, [1936] O.R. 290, [1936] 2 D.L.R. 438, referred to. Except that the arbitrators had found that it was a weekly hiring, the Court knew nothing of the terms of the contract in question, or of the facts upon which it could be determined whether or not the notice was reasonable. The arbitrators' conclusion was therefore a finding of fact, and, whether right or wrong, afforded no ground for setting aside the award.

A MOTION to set aside an award of arbitrators, and an appeal from the dismissal of that motion.

The submission and award, together with a letter written by the arbitrators, are set out in full in the judgment of ROBERTSON C.J.O., and are summarized in the headnote.

22nd October 1942. The motion was heard by ROSE C.J.H.C. in Weekly Court at Toronto.

E. F. Singer, K.C., and *B. Weinberg*, for the Hebrew National Association, applicant.

J. J. Glass, K.C., for Kramer, respondent.

22nd October 1942. ROSE C.J.H.C. (orally, at the conclusion of the argument):—It is to be remembered that this is in no sense an appeal. The submission did not provide for an appeal but, on the contrary, provided that there should be no appeal, and that the parties would stand to, abide by, observe, and perform, the award and determination that might be made by the Court of Arbitration. The case, therefore, is to be dealt with strictly as the case made by the notice of motion, that is, as a case for setting aside the award on the grounds, amongst others, that it was defective on its face; that it was wrong in law; and that the arbitrators ought to have dismissed the respondent's claim when they found as a fact that he was a weekly employee. On such a motion the Court is limited, as I understand it, and as it is put, for instance, in *Re Grant v. Eastwood* (1875), 22 Gr. 563, to errors appearing on the face of the award, or corruption, fraud, or excess of jurisdiction, or some other matters.

Now, I am assuming, without being very sure of my ground, that although I am limited to inquiry into what appears on the face of the award, I may look at the submission and also at the letter written by the arbitrators on the 26th June 1942, to the solicitor for the Hebrew National Association. Looking at the submission, I find that the matters referred were not expressly defined. The agreement was to refer all matters in dispute between the parties. Looking at the letter, I find that the arbitrators deemed it unnecessary to consider the point made by the Association as to the Statute of Frauds, that is to say, the point that the respondent could not have damages on the footing of a yearly contract because his hiring, which was for a year, was for a year that was to begin in the future. The arbitrators found, as appears in the award itself, that the hiring was on a weekly and not on a yearly basis. Therefore, they were right, as I see it, in saying, as they did say in the letter, that they were not concerned with the question as to the Statute of Frauds. They were limiting themselves, as they say in the letter, after they had come to their conclusion about the Statute of Frauds, to the claim made by the respondent against the Association for what they call "improper dismissal". So limiting

themselves, they proceed in the award to say that they find that the respondent is entitled in good conscience to an allowance covering the period of his convalescence from an illness, which is referred to in the affidavits, and until he had a reasonable opportunity of re-establishing himself, and that sum to which they thought he was entitled in good conscience they fixed at \$200.00 and awarded that the Association should pay that amount.

Now, Mr. Singer presents the case as if it appeared on the face of the award that the respondent had made a claim which would have been enforceable in a court of law for damages for wrongful dismissal, and as if that was the claim which the arbitrators were considering. Well, if the arbitrators were considering only the claim for wrongful dismissal, and if the amount that they awarded was shown on the face of the award to be in excess of the sum which the respondent could have recovered in court for the breach of a hiring on a weekly basis, then it would have appeared, I think, on the face of the award that the arbitrators had gone astray, and it would have been right to set aside the award or refer the matter back to the arbitrators. But I do not gather from the use in the letter of the expression "improper dismissal" that the arbitrators were considering merely the question whether the respondent in a court of law could have recovered anything and, if so, how much. The indication indeed is that they were considering something quite different from that. They find that his employment was on a weekly basis, and it must be that they knew that for legal damages for breach of such a contract he was not entitled to \$200.00. But, having found the fact, which in a court would have restricted his right of recovery to something less than \$200.00, they proceed to award not that he is entitled in law to \$200.00, but that in good conscience he is entitled to that sum. Now the question of what (if anything) in good conscience ought to be paid to him may, or may not, have been one of the questions submitted to the arbitrators. If, before the submission was entered into, the respondent had been saying, "In good conscience, and as a matter of fair dealing, I ought to be paid something in respect of the period with which the arbitrators have dealt", and if the Association had been saying, "No, you have been treated fairly, and in good conscience you are not

entitled to anything more than you have been paid", then that question as to what in good conscience he ought to have had, would clearly have been one of the questions submitted to the arbitrators. Whether in fact such a claim and denial of it had been made, is something of which I have no knowledge, and I could not have knowledge without going into evidence into which I am not entitled on this motion to go. But, there being the possibility that a dispute as to what equity rather than law required had existed, I do not see how I can find that on the face of the award it appears that in giving effect to what they deemed to be the equity of the case the arbitrators were exceeding their jurisdiction. And so I do not see how I can find that the award was defective on its face or wrong in law.

The courts many times have enunciated and acted upon the principle that awards are not lightly to be set aside; and in the case of a submission by this society and its employee to a court that has been set up by the Jewish community for the amicable settlement of disputes that may arise between members of the community, I think the endeavour ought to be to uphold the award if that is practicable; and the more so in this particular case because of the care that the arbitrators in their letter appear to have used in trying to be just and to make an acceptable award. The picture that you get from the letter, and from the award itself, is of a body acting with the utmost impartiality, being greatly concerned (as the arbitrators put it in the letter) about the proper mode of procedure, and being ready to find in favour of the Association that the hiring was not for the long period for which the respondent might have been entitled in law to considerable damage; on the other hand, considering just what, after all the evidence had been given, they thought was the equity of the case, and giving effect to that equity. Of course, if, notwithstanding all those reasons why the award ought, if possible, to be upheld, one came to the conclusion that in fact it was defective on its face, or was wrong in law, it would necessarily be set aside. But unless, clearly, it is defective on its face or wrong in law, — and I do not think it is either one or the other of these things—it ought to be upheld.

The motion will therefore be dismissed. I suppose it will have to be dismissed with costs.

4th December 1942. The appeal was heard by ROBERTSON, C.J.O. and GILLANDERS and MIDDLETON JJ.A.

E. F. Singer, K.C. (Bernard Weinberg with him), for the appellant: The appellant has a right to ask that the award be set aside because on its face it is bad; and it is well established that it is the duty of the Court to set aside an award where an error of law appears. The respondent was employed by the appellant and after various absences caused by illness he was dismissed with two weeks' salary in lieu of notice. The arbitrators having found that the respondent was a weekly employee, they should not have proceeded to award damages on the basis of "good conscience" or the needs of the respondent during his period of convalescence. The respondent had made certain charges against the appellant which were referred to arbitration, and the documents are sufficiently clear to show what was involved in the dispute. In view of the fact that the claim was made on the basis of a claim for improper dismissal, the arbitrators had no right to allow this relief. [ROBERTSON C.J.O.: You claim that this is a mistake in law because the claimant was a weekly, not a yearly, employee?] Yes; and therefore the award is wrong in law on its very face and should be set aside. On the established authorities it is clear that the arbitrators proceeded on a mistaken principle in assessing damages, having found that the respondent was a weekly employee. It would have been proper for the arbitrators to allow the motion for non-suit made by the appellant, when, at the close of the respondent's case, it was admitted that his contract with the appellant was not to have been performed within the period of one year, and that he had no memorandum in writing as required by The Statute of Frauds, R.S.O. 1937, c. 146, s. 4. The Court has no right to vary The Statute of Frauds more than any other statute, and the law must be administered in accordance with its clear provisions: *Miles v. Zuckerman*, [1931] O.R. 368 at 376, [1931] 4 D.L.R. 370.

John J. Glass, K.C., for the respondent: No appeal lies from the order of Rose C.J.H.C., since it is an interlocutory order. The trial judge was correct in finding that on such a motion the Court is limited to errors appearing on the face of the award, or corruption, fraud or excessive jurisdiction, or such like matters: *Re Grant v. Eastwood* (1875), 22 Gr. 563. None of these

things is alleged. Furthermore, this was not a trial but an arbitration, and an appeal from the arbitrators' decision is not justifiable on any of the grounds on which such an appeal would ordinarily lie. The Court cannot rightly say the arbitrators did not act judicially in finding that when an employee of an institution does his work efficiently and is dismissed improperly, he is entitled to compensation of some nature.

The arbitrators' letter cannot be looked at. [ROBERTSON, C.J.O.: The award is not good unless it is supported by the submission. If you sued on the award your submission would not be helpful since it does not define anything specifically, but refers in a general way to "all matters in dispute". That should be considerably clearer in order to establish that this award is made as the result of the submission.] It is apparent from the award that the arbitrators have taken into account all the circumstances of the situation. [ROBERTSON C.J.O.: Do you say that the arbitrators can ignore the law?] Yes; where the submission says they can settle all differences in dispute. It is a matter of equity and good conscience, since the arbitrators in this case were not confined merely to the question whether the respondent was a weekly employee or an employee for a longer period, but also dealt with all differences between the parties, amongst them being one that the respondent complained that the appellant had dealt with him unfairly. [ROBERTSON C.J.O.: We are completely unfamiliar with the Hebrew National Association. What is this arbitration board? Has it a clearly defined constitution?] There is nothing on the face of this award which negatives the assumption that the arbitrators were fully empowered to rule as they did. [ROBERTSON C.J.O.: Could you point to something by way of express direction on that point?] The award was made only after the arbitrators considered all the circumstances. Improper dismissal does not necessarily involve legal rights; there was something more to be dealt with by the arbitrators. Because the submission was not properly worded and the appellant did not correct it, it now wants the Court of Appeal to do so. Once again it is submitted that there is no right of appeal in this case, the order appealed from being an interlocutory one. The appellant in effect is asking for a new trial. A case in point wherein a motion was made to set aside an award is *Re Delagoa Bay Railway Co. and Tancred* (1869),

37 W.R. 578. [ROBERTSON C.J.O.: Was that an appeal from an order setting aside the award? Many of these motions to set aside come directly before the Court of Appeal.] I refer to *Hodder v. Turvey* (1873), 20 Gr. 63.

Cur. adv. vult.

11th December 1942. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—An appeal from the order of Rose C.J. H.C., dated 22nd October 1942, dismissing appellant's motion to set aside an award.

In my opinion the order of the learned Chief Justice is right, and the appeal must be dismissed, although, I think, on grounds that differ somewhat from the grounds stated by him in making the order.

The submission to arbitration is as follows:

"We, the undersigned, do hereby refer all matters in dispute between us to the award and determination of the Canadian Jewish Congress, Court of Arbitration, to consist of such arbitrators as may be designated or appointed by its Chairman, David B. Goodman.

"We agree that the said arbitrators shall have all the powers given by the Arbitration Act, Ontario, to arbitrators who shall have power to waive all or any of the provisions of the said Arbitration Act.

"We further covenant and agree to stand to, abide by, observe and perform the award and determination which may be made by the said Court of Arbitration, or a majority of its members, and that such award shall be final and not subject to appeal."

A letter was sent by the arbitrators to both parties in the course of the arbitration proceedings, which contains the following:

"Since the commencement of the proceedings in this case, we have been greatly concerned about the proper mode of procedure which we ought to pursue. The majority of the issues which have so far been brought out by Mr. Kramer are, it seems to us after careful consideration, not claims by one party against another which can be settled by legal action through the civil courts, or preferably through arbitration, but rather charges that an organization, and particularly one of the officers of that

organization, are not conducting their affairs in the best interests of the community.

“Obviously, since we were asked to serve as arbitrators pursuant to the terms of the submission under the Arbitration Act, we are obliged to conduct ourselves in the manner prescribed by the Arbitration Act. Accordingly, our function in this regard must be limited to the claims made by Mr. Kramer against the Hebrew National Association for improper dismissal, and we propose to continue with this portion of the case. . . .

“We therefore propose to restrict the scope of our present inquiry to the adjudication of Mr. Kramer’s claim against the Hebrew National Association for improper dismissal.”

As to the right to look at this letter to ascertain the subject-matter of the dispute dealt with by arbitration, see *Attorney-General for Manitoba v. Kelly et al.*, [1922] 1 A.C. 268, at 279, 62 D.L.R. 370, [1922] 1 W.W.R. 576.

Later the arbitrators made their award as follows:

“IN THE MATTER OF THE ARBITRATION ACT.
KRAMER v. HEBREW NATIONAL ASSOCIATION.

“After carefully considering the evidence in this matter, we have come to the conclusion that Mr. Kramer was hired on a weekly and not on a yearly basis. On the other hand, we are not convinced that Mr. Kramer was discharged because of inefficiency in or inattention to his work, but rather because of personal disagreements between himself and Mr. Green which do not concern us here. Since Mr. Kramer was discharged immediately after leaving the hospital, we feel that he is entitled in good conscience to an allowance covering the period of his convalescence and until he had a reasonable opportunity of re-establishing himself. In view of these considerations, we direct that the Hebrew National Association shall pay to Mr. Kramer the sum of \$200.00.”

The Association moved to set aside the award, alleging a number of grounds, which are really reducible to this, that there was error in law appearing on the face of the award. The alleged error in law is that in the case of a weekly hiring, where the claim is for “improper dismissal” of the employee, the arbitrators gave effect to the consideration that they felt that the claimant was entitled “in good conscience to an allowance covering the

period of his convalescence and until he had a reasonable opportunity of re-establishing himself."

If I may very briefly summarize the opinion of the learned Chief Justice of the High Court upon this contention, it was that for all that appeared the matter in dispute (which was wholly undefined by the submission), may have been, not what sum the claimant had a strict legal right to be paid, but rather what sum the claimant "in good conscience" ought to be paid by the Association. If the latter was the question in dispute, then that appeared to be the question that the arbitrators had decided, and there was no error in law as contended.

Appellant contends that the learned Chief Justice was wrong in thinking that there may have been a question submitted to the arbitrators that was not to be determined according to principles of law, and that the arbitrators had no warrant for measuring respondent's claim by any other standard than his legal rights.

It may be that appellant is right in this. In Russell on Arbitration and Award, 13th ed., at p. 332, the rule is stated in this way — "It is the duty of an arbitrator, in the absence of express provision in the submission to the contrary, to decide the questions submitted to him according to the legal rights of the parties, and not according to what he may consider fair and reasonable under the circumstances."

In *Jager v. Tolme & Runge et al.*, [1916] 1 K.B. 939, Swinfen Eady L.J., at p. 953, said:—"The council are to give a decision—they are to decide—and in the absence of fuller and wider powers expressly given that means to decide according to the legal rights of the parties."

Taking this as the established rule, and assuming that it fully applies to this case, in my opinion the question in respect of which error in their award is charged against the arbitrators by appellant, was a question of fact and not a question of law. In the absence of some custom or of some provision, express or implied, in the contract governing the matter, the notice that an employee is entitled to receive of termination of the hiring is reasonable notice, and what is reasonable notice is a question of fact: *Payzu, Limited v. Hannaford*, [1918] 2 K.B. 348; *Carter v. Bell & Sons (Canada) Ltd.*, [1936] O.R. 290, [1936] 2 D.L.R. 438, and see 22 Halsbury, 2nd ed., p. 150, and 7 C.E.D. (Ont.),

pp. 162-164. We know nothing of the terms of the contract of hiring in question, except that the arbitrators found that it was a weekly hiring. We know nothing of the circumstances of the hiring, nor of the nature of the employment, nor of the rate of pay, nor of any of the other considerations that may have led the arbitrators to the conclusion set forth in their award. Their conclusion was, in its nature, a finding of fact, and whether it was right or wrong it affords no ground for setting aside the award.

Appeal dismissed with costs.

Solicitor for the applicant, appellant: B. Weinberg, Toronto.

Solicitor for the respondent: J. J. Glass, Toronto.

[COURT OF APPEAL.]

Davis & Turpin v. The City of Sudbury.

Drainage—Powers of Municipalities—Maintenance—Extent of Powers as to Improvement of Natural Watercourses without Petition—The Municipal Drainage Act, R.S.O. 1937, c. 278, ss. 1(g), 2, 8(9), 77, 78.

Subs. 1 of s. 77 of The Municipal Drainage Act, R.S.O. 1937, c. 278, authorizes a municipality, without petition, to expend public moneys for repairing a drainage work constructed under the provisions of the Act or of any Act respecting drainage by local assessment. This was held, in *Sutherland-Innes Company v. Township of Romney* (1900), 30 S.C.R. 495 at 525, 2 C. & S. 96, to be limited to artificial drains, and not to apply to or authorize similar works upon a natural watercourse, for the purpose of draining lands. In 1906, however, what is now subs. 3 of the same section was enacted, and this provided that the provisions of the section should apply to the better maintenance of a natural stream, creek or watercourse which had been artificially improved "by local assessment or otherwise". This new subsection gave a new and substantive right. *Re Township of Orford and Township of Aldborough* (1912), 27 O.L.R. 107 at 119, 7 D.L.R. 217, applied. What the subsection authorizes to be maintained is the natural watercourse itself, and not merely the artificial improvements upon it. There is no ground for restricting the ordinary meaning of the word "otherwise" in the phrases above quoted, even to the extent of limiting the subsection to cases where the improvement has been made by the expenditure of public money. In the circumstances of the present case, *held*, subs. 3 was applicable although the watercourse had been improved in part by private means.

S. 8(9) of the Act, providing for the assessment of compensation to the owners of low-lying lands, instead of continuing the drain to a sufficient outlet, where the cost of such continuation would exceed the probable amount of injury, deals with works of construction, undertaken after a petition, and not with works of maintenance and repair. S. 77, giving the power to make assessments for works of maintenance, does not cover allowances for injury, but s. 79 corresponds to s. 8(9). But both sections authorize the making of such an allowance upon one ground only, and if it appears that an allowance was made for a wholly different reason, it is made without jurisdiction, and cannot stand. Further, there is no power in the engineer, in making his assessment for benefit under s. 77, to set off against that assessment an amount allowed as compensation. *Thackery v. Township of Raleigh* (1898), 25 O.A.R. 226 at 236, 1 C. & S. 328, referred to.

Estoppel—Extension of Statutory Powers.

It is generally a matter of difficulty to apply the doctrine of estoppel as justifying an extension of statutory powers beyond their proper limits. In the present case, *held*, in view of the decision on another ground, it was unnecessary to consider the contention of the respondent as to estoppel.

AN appeal from the decision of the referee under The Municipal Drainage Act, R.S.O. 1937, c. 278, refusing to quash certain municipal by-laws providing for drainage works. The facts are fully stated in the judgment.

7th and 8th December 1942. The appeal was heard by ROBERTSON C.J.O. and RIDDELL, MIDDLETON, FISHER and HENDERSON JJ.A.

E. C. Awrey, K.C., for the appellants: This work was not authorized by petition, as expressly required by s. 2 of The Municipal Drainage Act, R.S.O. 1937, c. 278, and it is not maintenance within the meaning of s. 78, because the two creeks in question are both natural watercourses running through the city, and neither is a drainage work within the meaning of the Act.

As to s. 77(3), the subsection refers only to "the better maintenance of a natural stream, creek or watercourse which has been artificially improved by local assessment or otherwise". This applies only to works constructed under legislation of this kind, and the words "or otherwise" must be so limited. [ROBERTSON C.J.O.: Can it not mean "by local assessment or some other means"?] Construction out of general funds might be "otherwise". The whole subsection is governed by the word "maintenance", which is defined in s. 1(g). [HENDERSON J.A.: The whole point of the case is whether these proposed works can be properly called maintenance.] [ROBERTSON C.J.O.: The natural watercourse here has been improved by private enterprise. Is that not within the words "or otherwise"?]

If this watercourse was a drainage work within the meaning of s. 78, then the fact is that it was constructed partly out of general funds, and partly out of private ones: *Brown v. Township of Sarnia and McMullin* (1914), 1 Sm. & S. 234. There must be a drainage work, and an area to be benefited thereby, and the proposed work must be maintenance of an existing drainage work; the section does not extend to the construction of a wholly new work. There is no provision in that section for dykes, banks, etc.

[ROBERTSON C.J.O.: Should we not know more about the particular works to which you are objecting?] Before 1930 there were no private works constructed, and by-law 2185 recites that "drainage works have heretofore been constructed in the course of Nolin's and Junction Creeks out of the general funds of the municipality of the City of Sudbury, and said works are inadequate to prevent damage to lands and roads". In fact, no such drainage works have ever been constructed out of general funds, and we contend that no drainage work had been completed at all. The municipality started a large civic improvement scheme, and then tried to bring it under The Municipal Drainage Act in order to finance it.

Work done upstream cannot be maintenance of a drainage work downstream. Such work would be only for the benefit of property situated upstream. The engineer's report provides, *inter alia*, for the covering of a part of the proposed work which was a natural watercourse, and this is something which clearly requires a petition. [ROBERTSON C.J.O.: The salient question is whether this was a proper work of maintenance. If certain things are constructed, such as storm sewers, why can they not be considered useful for drainage purposes? The Act includes various works, and if there is benefit to lands incidental to proper maintenance, why should there be any complaint?] If the benefit is merely incidental, and the work is properly maintenance, there could be no complaint: *Re Township of Gosfield South and Township of Gosfield North* (1917), 39 O.L.R. 93 at 97, 35 D.L.R. 119; *Township of Dover v. Township of Chatham* (1909), 15 O.W.R. 156 at 161, 1 O.W.N. 327.

[ROBERTSON C.J.O.: Does not s. 77(3) apply here? There is a natural watercourse on which there have been artificial improvements by general funds or otherwise. Surely subs. 3 extends to such a creek, a natural creek artificially improved. The municipality can change the course, alter the outlet, or construct walls or dykes, so why can it not do the work here contemplated?] It is submitted that subs. 3 must be read subject to the definition of "maintenance" in s. 1(g) of the Act. [HENDERSON J.A.: Under The Local Improvement Act, R.S.O. 1937, c. 269, s. 9, the council may proceed on its own initiative. In any event, what status have you to complain? You have benefited and it does not lie with you to complain of the expenditure.] The work purports to have been authorized by s. 78 of The Municipal Drainage Act, and we submit that the municipality had no power to do it under either s. 78 or s. 77(3).

J. H. Rodd, K.C. (E. C. Facer with him), for the respondent: The appellants have no status. They were prime movers in inducing the council of the City to proceed with the work as recommended in the engineer's report, and entered into an agreement with the council for the carrying out of this project. They are therefore estopped from contesting the validity of the by-laws. This work was undertaken as the result of numerous petitions, after floods had twice inundated the city. I refer to *Dillon v. Township of Raleigh* (1886), 13 O.A.R. 53; *Gibson v.*

Township of North Easthope (1894), 21 O.A.R. 504. [ROBERTSON C.J.O.: You need not rely on estoppel if you can show that you acted in accordance with the provisions of the Act. How can you rely upon the doctrine of estoppel unless the respondent changed its position in reliance upon the appellants' representations?] [HENDERSON J.A.: The appellants protested against their assessment—how have they done anything to recognize the engineer's report as valid?] By this appeal, which is the taking of a step under the report. [ROBERTSON C.J.O.: That might raise a question of waiver rather than estoppel.] There is a reference to the principle of equitable estoppel in *Township of McKillop v. Township of Logan et al.* (1899), 29 S.C.R. 702 at 705, 2 C. & S. 499.

No petition was required for this work. S. 2 of the Act refers only to a new work. Ss. 71, 72, 73 and 74 deal with the duty cast upon a municipality to maintain a drainage work as it stands. S. 75 provides for varying the assessment. The sections pertaining to repairs are ss. 76 and 77, particularly the latter, which is exactly applicable to this case.

The City has been spending money on these creeks for years, after the pressing demands of the people. *In re Funston and Township of Tilbury East* (1885), 11 O.R. 74; *In re Rochester and Township of Mersea* (No. 2) (1901), 2 O.L.R. 435, 2 C. & S. 60.

A distinction should be drawn between deepening a creek and digging a ditch: *Fewster v. Township of Raleigh* (1894), 1 C. & S. 227. S. 77 is the governing section in this case: *Re Township of Orford and Township of Aldborough* (1912), 27 O.L.R. 107 at 118.

As to the allowances, I refer to *Sutherland-Innes Company v. Township of Romney* (1900), 30 S.C.R. 495. [HENDERSON J.A.: I am unable to find in *Re Stephens et al. and Township of Moore* (1894), 25 O.R. 600, any reference to a rebate to persons assessed.]

E. C. Awry, K.C., in reply.

Cur. adv. vult.

21st December 1942. The judgment of the Court was delivered by

ROBERTSON C.J.O.: This is an appeal from the judgment or order of the referee under The Municipal Drainage Act,

dated 10th August 1942, whereby he dismissed the application of the present appellants to quash respondent's by-laws 2185 and 2186, and the report referred to therein.

By an earlier by-law, no. 1922, passed on the 2nd May 1938, the respondent's council instructed its engineer, William B. McMullen, to examine certain drainage work, partly in the course of Nolin's Creek and Junction Creek, and to make a report to the council under the provisions of The Municipal Drainage Act, R.S.O. 1937, c. 278, on such repairs, improvements, alterations, extensions or new outlet, as might be found necessary to provide drainage and prevent damage to lands or roads, and to prepare plans, etc. for the work he might recommend, and an assessment against lands and roads in any way liable to be assessed therefor under the provisions of The Municipal Drainage Act. The engineer made his report, dated 5th April 1939. By-law no. 2185, the first of the by-laws attacked, adopted the engineer's report and schedules thereto, plans, specifications, estimates, allowances and assessments, and directed that the drainage works as therein indicated should be made and constructed in accordance therewith. This by-law also authorized the borrowing of the funds necessary for the work and not otherwise provided for. By-law no. 2186, which was passed on the same day as by-law no. 2185, provided for the issue of debentures in the sum of \$92,375.78, to provide for the cost of part of the work to be done.

The proceedings taken by the respondent as outlined in the several by-laws and in the engineer's report are attacked upon a number of grounds. The fundamental ground is taken that The Municipal Drainage Act does not authorize respondent to construct the work except upon petition of the owners of the lands to be benefited, as provided by s. 2 of the Act. The work has in fact been undertaken by the appellant as a work of maintenance or repair, and for work that is properly maintenance or repair a petition is not required.

Nolin's Creek and Junction Creek, two natural streams or watercourses arising outside the limits of the city of Sudbury, run into it, and form a junction well within the municipality, then flow as one watercourse for a further distance through the municipality, and find an outlet in a lake lying beyond its boundaries. At times these creeks bring down great quantities of

water, and with the building up and development of the city, at times there are floods that cause widespread damage within the city. Works of one kind and another have been done within the city for the improvement of these watercourses, in efforts to eliminate or to mitigate the damage from floods. The municipality itself expended money for the purpose out of its general funds, and other works, either constructed by private owners or to which they contributed either work or materials, are incorporated in the work recommended by the engineer's report. A situation had at last arisen that, in the opinion of the municipal council, required that the whole problem created by these creeks should be dealt with in a comprehensive manner by drainage works that would control the waters of the creeks and carry them off safely.

None of the work that had been done on either of the creeks was done under The Municipal Drainage Act, or under any other Act respecting drainage provided for by local assessment, and the appellants—who are large property owners within the city of Sudbury, and who are assessed for substantial amounts in respect of the work now undertaken—contend that the work now undertaken is not work of maintenance and repair, but work of construction that could not properly be authorized by the municipality under The Municipal Drainage Act, except on petition under s. 2.

The referee, after hearing evidence and argument, upheld the several contentions of the respondent, (1) that there were along the course of these creeks various works which were drainage works within the meaning of s. 78 of The Municipal Drainage Act, that formed a basis for the work of maintenance; (2) that if the present work is not authorized by s. 78, it is authorized by subs. 3 of s. 77, as maintenance of a natural stream, creek or watercourse that has been artificially improved; and (3) that in any event appellants are estopped from objecting to the legality of the works and assessments and by-laws.

S. 78 provides that "Any drainage work heretofore or hereafter constructed out of the general funds of any municipality, or out of the general funds of two or more municipalities, or when constructed by statute labour, or partly by statute labour and partly by general funds or out of funds raised by a local assessment under a by-law which is afterwards found to be

illegal or which does not provide for repairs, need not be repaired out of such general funds, but the council of any of the contributing municipalities may, without the petition required by section 2, on the report of an engineer or surveyor, pass a by-law for maintaining the same at the expense of the lands and roads assessable for such work."

I find difficulty in concluding that the language of s. 78 is wide enough to cover all that is contemplated by the report of the engineer. The work now authorized goes far beyond maintenance and repair of the work that has been constructed heretofore. It provides for the construction of substantial works, at locations where there has been no earlier work done. Among other new works the present scheme includes the diversion of the waters of Nolin's Creek into Junction Creek by an important and expensive cut-off at a point considerably down-stream from where they have heretofore discharged. While the draughtsman of by-law no. 1922 seems, from the terms he has used, to have had s. 78 before him, I do not think that section is applicable to the work now undertaken.

I am, however, of the opinion that sufficient authority for all the works undertaken is to be found in subs. 3 of s. 77. This section, in subs. 1 (which is of much longer standing than subs. 3) provides for repairing, upon examination and report by an engineer, of a drainage work constructed under the provisions of this Act or any Act respecting drainage by local assessment. It was held, however, that this gave the municipality authority only in respect of drainage works that had been constructed, that is, artificial drains constructed, under municipal by-laws, and that it did not apply to nor authorize similar works upon a natural watercourse, for the purpose of draining lands. (*Sutherland-Innes Company v. Township of Romney* (1900), 30 S.C.R. 495 at 525, 2 C. & S. 96). In 1906 an important amendment was made to the section by adding to it what is now subs. 3 (6 Ed. VII, c. 37, s. 9), which reads as follows:

"(3) The provisions of this section shall apply to the better maintenance of a natural stream, creek or watercourse which has been artificially improved by local assessment or otherwise, and to any drainage work constructed under the provisions of The Ontario Drainage Act, being chapter 36 of the Revised Statutes of Ontario, 1887, in the same manner, to the same

extent, and by the same proceedings as are hereby made applicable to the better maintenance of a drainage work wholly artificial."

As was said in *Re Township of Orford and Township of Aldborough* (1912), 27 O.L.R. 107 at 119, 7 D.L.R. 217, the enactment of this subsection gave "a new and substantive right".

It is to be noted that what this subsection authorizes to be maintained under the provisions of the section is the natural creek, stream or watercourse, and not merely the artificial improvements upon it. "Maintenance" is defined in s. 1(g) of the Act as meaning "the preservation and keeping in repair of a drainage work." S. 77, however, in express terms authorizes, for "better maintenance", the change of course, the making of a new outlet, the construction of a tile drain under the bed of the whole or any portion of the drainage work as an ancillary thereto, the construction, reconstruction or extension of protective banks, walls, dykes and other protective works, as ancillary to the drainage work, or otherwise improving, extending or altering the work, and the covering the whole or any part of the work. Any or all of these may also be done for the better maintenance of a natural stream or watercourse which has been artificially improved by local assessment or otherwise, and subs. 3 authorizes this to be done in the same manner, to the same extent and by the same proceedings as subs. 1 of s. 77 authorizes for the better maintenance of a drainage work wholly artificial. There is no requirement of a petition from the owners affected, and the engineer is given all the powers to assess and charge lands and roads in any way liable to assessment under the Act for the expense of the works in the same manner and to the same extent, by the same proceedings and subject to the same rights of appeal as are provided with regard to any drainage work constructed under the provisions of the Act.

There can be no doubt, on the evidence, that the two creeks in question had been artificially improved, not perhaps by local assessment, but "otherwise", and I see no ground for restricting the ordinary meaning of the word "otherwise", even to the extent of confining the subsection to cases where the improvement had been made by the expenditure of public money. Certainly the subsection cannot be so restricted that there will be excluded from it any watercourse on which improvements have been

made out of public funds, merely because other improvements have been made by private owners. Yet that is involved in the contention made by appellants.

The essence of appellants' contention is that the only maintenance authorized by subs. 3 is maintenance of drainage work artificially constructed, and that maintenance of what nature has provided is not authorized by it. No doubt appellants would admit that a case would come within the subsection where a natural stream, creek or watercourse had been absorbed into a drainage work so that it had lost its natural character. Counsel's constant reference in support of his contention was to the definition of "maintenance" in s. 1(g), as the preservation and keeping in repair of a *drainage work*. This is to lose sight of the plain purpose of subs. 3, which, by express language, extends the provisions made elsewhere in s. 77 for the maintenance of a drainage work, to the maintenance of a natural stream, creek or watercourse artificially improved.

Appellant further argued that to give to subs. 3 of s. 77 the effect necessary to support the proceedings in question here would mean that once a stream had been artificially improved at some one point in its course, any of the works mentioned in subs. 1 of s. 77 might be done at any other place on the stream, no matter how remote from the former improvement, nor how unrelated the new work contemplated might be to the work formerly done. It is not necessary, for the purpose of the present appeal, that we should attempt to define the precise limits of subs. 3. It is sufficient to say that the works covered by the engineer's report come well within the subsection. They are designed to provide, by one comprehensive scheme, the means for doing effectively what was attempted to be done, but was not efficiently done, by the numerous smaller works of improvement theretofore constructed over a term of years. Doubtless it is expected that the new works will afford needed drainage for lands that the earlier works left undrained, and it is of sufficient capacity to take care of water in quantities that the natural stream, with its former improvements, could not contain and that caused disastrous floods. All the works now provided for come, however, within the description in subs. 1 of s. 77 of the works that may be done as "maintenance".

In my opinion on these grounds sufficient statutory authority for the works recommended by the engineer's report is to be

found in subs. 3 of s. 77. It do not think it necessary, therefore, to discuss the question of estoppel, upon which respondent also relies. I should say, however, that I find great difficulty in applying the doctrine of estoppel against appellants in this case. It is generally a matter of difficulty to apply the doctrine of estoppel as justifying the extending of statutory powers beyond their proper limits. The evidence here would also seem to come somewhat short of proving that respondent was led by any words or conduct of appellants' into proceedings that were not warranted by statute, if it should be found that respondent's proceedings are not so warranted.

Numerous other objections were taken by appellants to respondent's proceedings, but I find it necessary to deal with only one of them. S. 8 of the Drainage Act provides, in subs. 9, as follows:—

“Where, in the opinion of the engineer or surveyor, the cost of continuing the drainage work to a point where the discharge of water will do no injury to lands and roads, or the cost of constructing the drainage work with sufficient capacity to carry off the water, will exceed the amount of injury likely to be caused to low-lying lands along the course of, or below the termination of the work, instead of continuing the work to such a point, or constructing it of such capacity, he may include in his estimate of the cost of the drainage work a sufficient sum to compensate the owners of such low-lying lands for any injuries they may sustain from the drainage work, and he shall in his report determine the amount to be paid to the respective owners of low-lying lands in respect of such injuries.”

The following paragraph appears in s. 4 of the engineer's report:—

“It is neither advisable nor economically possible to construct a drainage work of such depth, capacity, and outlet, as would insure against damage under abnormal or unforeseen circumstances. I therefore determine that the owners of all lands hereinafter assessed for benefit shall be allowed for any possible insufficient capacity of the drainage work or insufficiency of its outlet, the amounts shown in Schedule ‘B’ under the heading of sub-section 9 section 8 and for the same reason I determine the allowances to be paid to owners of lands not assessed for benefit for the amount as shown therefore in the same schedule.”

In his estimate of the cost of the work item 4 is as follows:—

“Allowances to owners under sub-section 9 of section 8 of the Municipal Drainage Act, to be deducted from the Assessment for benefit . . . \$14,270.00.”

In Schedule “B” of the report, which contains the Assessment for Benefit, the engineer included a column headed “Sub-section 9 Section 8.” In this column he set forth the amounts allowed to persons assessed for benefit as an allowance under subs. 9 of s. 8, and in each case the amount of such allowance is deducted from the amount assessed against each individual owner, and a reduced sum is the result, and this is set forth in a column headed “Net Assessment”. This net assessment, with interest added, is then divided into equal annual assessments over a ten-year period. The individual allowances purporting to be made under subs. 9 of s. 8 are usually small sums, but that is not true in all cases, and the aggregate of the allowances is the amount of \$14,270. Included in this total are a number of individual allowances in cases where there is no assessment against the owner, and there is, therefore, no set-off, and in such cases the allowances apparently are to be paid in one sum in cash.

There is so much wrong with this matter of allowances purporting to be made under subs. 9 of s. 8 that it is difficult to know where to begin to discuss it. S. 8 deals with works to be constructed after petition and report and not with maintenance or repair. The engineer is given power under s. 77(1) to make assessments, and to charge lands and roads in any way liable to assessment under the Act, for the expense of maintenance done under s. 77, to the same extent and by the same proceedings, and subject to the same rights of appeal as are provided with regard to any drainage work constructed under the provisions of the Act. This language, however, does not cover allowances for injury. One finds in s. 79 the provision for such allowances in connection with works of maintenance, that corresponds generally with the provision made by s. 8, subs. 9 for works of original construction. If, therefore, it was proper to make these allowances at all, they should be made under s. 79.

In the hearing before the referee the respondent called as witnesses both Mr. McCubbin and Mr. MacRostie, engineers who had collaborated with respondent's engineer, Mr. McMullen, and

who had consulted with him in the preparation of the report, as indicated by their signatures to a memorandum so stating, at the end of it. They both agreed that there was no insufficiency of capacity in the works contemplated to carry off the water to a sufficient outlet. The reason for making the allowances, purporting to be made under s. 8(9), is stated in this way by Mr. MacRostie, "For the reason that some person adjacent to that area—the benefited area—might put a cellar, or have a cellar lower down than the top of this channel, and might of his own free will, and unauthorized, connect to it, and without taking proper precaution he might be flooded." Mr. McCubbin, among other statements, said, "You cannot provide drainage deep enough to drain the basements—any basements that may be constructed below the levels of the creek flats. You can drain down to that level." At another place he said, "If a person constructs a basement extending down six feet below the flats of the creek, you cannot expect any reasonable drainage scheme to keep flood levels lower than the bottom of the basement." Again he said, "That work will lower the flood waters several feet, but if a person has a basement in what is now the flats of the creek, or brings water there and puts a connection in a lower part of the drainage work, and conducts water back into his own premises, he might think he was injured, whereas he is injuring himself." Mr. McMullen, the engineer who made the report, was called as a witness by the respondent and gave his evidence after Mr. McCubbin had given his. Mr. McMullen does not appear to have been asked anything with respect to the allowances now under consideration, but in any case he did not in any way contradict or correct what Mr. McCubbin and Mr. MacRostie had said.

I do not see how, in face of the evidence, it can be said that the allowances amounting to \$14,270 are warranted by the provisions of s. 79, or, for that matter, of s. 8(9), if the latter had any application. Respondent's counsel sought to dispose of this whole matter by reference to subs. 10 of s. 8, which provides that any owner of lands affected by the drainage work may appeal from the report if dissatisfied with it in respect of any of the provisions of s. 8, and further provides that the referee on an appeal under this subsection may make such order as to him seems just, and his decision shall be final. I very much doubt whether the provision for appeal in subs. 2 of s. 79 covers the

same ground. In the first place, the right of appeal is given only to "any owner of such low-lying lands", and there seem to be no words making the decision of the referee final. In any event, where there is evidence that the allowances were in fact made, not for the purposes mentioned in either subs. 9 of s. 8 or s. 79, but for a quite unauthorized purpose, the matter would seem to be one of jurisdiction to make the allowances. That is a matter in which everyone assessed is interested, for the total amount of the allowances, aggregating \$14,270, is added to the cost of the work of maintenance.

This is not all that is complained of in respect of these allowances. I have already pointed out how the engineer's report deals with many of these allowances by setting them off against assessment for benefit, while in cases where there is no assessment for benefit, the allowances are to be paid in cash. I know of no power that the engineer has to set off such an allowance against benefit: *Thackery v. Township of Raleigh* (1898), 25 O.A.R. 226 at 236, 1 C. & S. 328, per Osler J.A. It is also objectionable, I think, to discriminate between different persons entitled to an allowance by a set-off of damage against assessment, in one case, and payment of the allowance in cash, in another case. The method adopted by the engineer of dealing with these allowances by applying them in reduction of assessment, in the case of many owners, embarrasses the whole position. The case might not be a difficult one to treat by deducting from the cost of the work the sum of \$14,270, the amount of the allowances made without jurisdiction. The unsound allowances have, however, become so involved with the assessments made that a simple process of cutting them off may not be enough. We have here a work that it is estimated will cost \$369,150, and there is reason to believe that it is necessary work, and work that will be of great benefit both to the municipality and to the property owners. The work is one that is duly authorized by The Municipal Drainage Act, and it would be regrettable if the municipality should be unduly embarrassed or delayed in proceeding with it. It is, however, impossible to overlook, not only the irregularities, but the absence of jurisdiction apparent in connection with the item of \$14,270 to which I have referred. That amount should, in any event, be stricken out of the amount that the municipality has authorized to be borrowed under by-law no. 2185, and to

that extent that by-law ought to be quashed. This may not be an entirely satisfactory or sufficient way to deal with the matter from appellants' point of view. It may be that the respondent on the other hand will desire to make application to the Legislature to sanction and ratify, in whole or in part, its proceedings. I think, therefore, that it should be left open to the parties, or either of them, to speak to this matter on the settlement of the order of this Court, and further consideration may then be given to the matter. Success on the appeal being divided, there should be no costs of the appeal to either party, but the question of costs may also be spoken to when we come to deal with the matter finally.

By-law quashed in part only; terms of order to be spoken to.

Solicitors for the appellants: L. A. Landreville, Sudbury; Furlong, Furlong & Awry, Windsor.

Solicitor for the respondent: E. C. Facer, Sudbury.

[ROSE C.J.H.C.]

**Re The Brotherhood of Locomotive Firemen and Enginemen
and McDougall.**

Insurance—Fraternal Society—Right of Member to Designate Beneficiary, including Estate—Unincorporated Society—The Insurance Act, R.S.O. 1937, c. 256, ss. 128, 129, 130, 131, 134, 153, 160.

M. was a member of an unincorporated fraternal benefit society, and was entitled, in the event of his death, to have a sum of money paid to the beneficiary named in his beneficiary certificate. The beneficiary so named was M.'s wife, who predeceased him. During his wife's lifetime M. made a will, leaving all his estate, including the proceeds of life insurance, to a trustee upon certain trusts, including the payment of debts. According to the constitution of the society, a member was entitled to designate as beneficiary only a member of a class consisting of relatives and dependants only; if there was no legally designated beneficiary, the fund was to be paid according to the constitution to relatives and dependants in a prescribed order, and if there was no such person living, the proceeds were to revert to the general fund of the society.

Held, by the combined effect of ss. 129, 130, 131, 134, 153 and 160 of The Insurance Act, R.S.O. 1937, c. 256, the will was a valid designation of a beneficiary, after the death of the wife, and operated to make the money available to M.'s creditors, although it was clear that the scheme of the society was to provide benefits for a member or his dependants, and not to permit him to divert these benefits to his creditors. Since the society was not incorporated, it was not within the definition of a fraternal society in s. 128(9), and reference therefore could not be made to its constitution and by-laws, or to any document except the beneficiary certificate, which was not sufficient to exclude the operation of the other provisions of the Act. *Wintemute v. Brotherhood of Railroad Trainmen* (1900), 27 O.A.R. 524, considered.

Insurance—Life—Designation of Beneficiary—Designation by Will—Obstacle Existing at Date of Will, but Removed before Death—The Wills Act, R.S.O. 1937, c. 164, s. 26(1).

The fact that a will designating a beneficiary is made at a time when the testator has no power to make such a designation does not prevent the will from becoming operative if, at the time of his death, the obstacle has been removed. *Re Cole* (1916), 36 O.L.R. 173, 29 D.L.R. 492; *Re Wythe*, 60 O.L.R. 323, [1927] 2 D.L.R. 1161, discussed.

A MOTION by the guardian of the infant (adopted) daughter of J. B. McDougall, deceased, for payment out of court of moneys paid in by The Brotherhood of Locomotive Firemen and Enginemen, an unincorporated fraternal benefit society, hereafter referred to as "the Brotherhood", pursuant to the provisions of The Insurance Act, R.S.O. 1937, c. 256.

The deceased was a member of the Brotherhood, and on his death a sum of money became payable by the beneficiary department thereof. A dispute arose, as to the disposition of this money, between the guardian of the deceased's adopted daughter and the creditors of the estate, and a motion was launched by the Brotherhood for directions. This motion was changed, at

the hearing, into one for payment of the money into court, and leave was given to pay in. The present motion was then launched.

18th November 1942. The motion was heard by ROSE C.J. H.C. in Weekly Court at Toronto.

F. C. Forster, for the Brotherhood and for the guardian.

A. C. Heighington, K.C., for the executor and trustee of the deceased.

18th November 1942. ROSE C.J.H.C. (orally, at the conclusion of the argument):—What the parties desire to have determined is whether the moneys payable under the benefit certificate issued by the Brotherhood of Locomotive Firemen and Enginemen belong to the testator's creditors or to his adopted daughter. Counsel have endeavoured to find a means by which that question can be determined without too much expense. As the matter stood when it was before me on the first occasion, there was some difficulty in achieving the result desired. The contestants at that time were the guardian of the testator's adopted daughter and those creditors who were represented by Mr. Heighington. Those, however, were not all of the creditors, and it would have been difficult, if not impossible, upon the representation of parties then existing, to bind those creditors who were not represented. That difficulty, however, disappeared when the money was paid into court and the executor decided to oppose the application of the guardian, and to ask that the money be paid to him, and when he retained Mr. Heighington, who theretofore had appeared for the creditors, to appear for him and urge his right as an executor to the money. As the case stands, we have cross-applications for the payment of the money out of court, on which everyone who can assert a direct claim to it is properly represented, and it becomes possible to ascertain who in law is entitled to the money and to make the requisite order for its disposition.

Mr. McDougall, the testator, was a member of the Brotherhood and, as appears by the beneficiary certificate, was entitled to all the rights, privileges and benefits of membership, and in the event of his sustaining certain injuries to participate in the beneficiary fund of the Brotherhood to the extent of \$4,500, and in the event of his death to have the moneys paid to his beneficiary, his then wife Laura, or in the event of her

death prior to his, to have the moneys paid to the person or persons who might be entitled thereto in the order prescribed by the constitution of the Brotherhood. I am not stating the whole of the certificate; for my present purpose that is a sufficient statement of the rights which it professed to confer.

In Mrs. McDougall's lifetime, Mr. McDougall made his will, dated August 16th, 1940. Mrs. McDougall died in March, 1941. McDougall himself died in August, 1941. By his will he gave all his estate, both real and personal, including the proceeds of life insurance, to his trustee upon trust, first: to pay his debts and so on; secondly: to convert the residue; thirdly: to provide a life income from the residue for the widow; and fourthly: upon the death or re-marriage of the widow, to give the whole remaining estate to the daughter; and the question is whether that diversion by will of the proceeds of the beneficiary certificate from Mrs. McDougall to the estate is valid and effective, or whether, on the other hand, the daughter or the daughter's guardian shall have the money on the footing that the daughter, being the only remaining member of the preferred class, or the person who, under the rules and constitution of the Brotherhood is to take, shall take.

The scheme of the beneficiary department of the Brotherhood, as appears by the parts of Article 9 of the constitution that are to be found on pages 57 to 59 inclusive of the book that has been put in as an exhibit, is this: The Grand Lodge is to establish and maintain a department, to be known as the Beneficiary Department; all members not over thirty-two years of age who so desire may participate in the Beneficiary Department for the purpose of providing an insurance to be paid (1) on the death of the member to one or more of the prescribed beneficiaries, or (2) to the member who sustains a loss or who reaches the age of seventy years; the member may designate as his beneficiary or beneficiaries one or more persons of the class, and no other; the class is: wife, child or children, mother, father, sisters, brothers, other relatives by blood to the fourth degree, or persons dependent upon the member for support; and in a certain case the member may designate that the amount of his certificate be used for his own funeral expenses and for certain other purposes. The term "child", I ought to have mentioned, includes a legally adopted child. If there is no legally designated beneficiary, the fund is to be paid subject to the

provisions of the constitution in the order set forth, namely: first, to the widow; second, to the child or children; third, to the mother; fourth, to the father; fifth, to sisters and brothers equally, and if there is no member of that class of persons living, and no beneficiary named in the certificate who is entitled to the amount, the proceeds shall revert to the fund; that is to say, the scheme is to provide for benefits to the member and in the case of his death to certain dependants, and there is no intention that the member shall have any right to make the money payable to his creditors.

In the certificate itself it is provided that if the beneficiary named, that is in this case, Mrs. McDougall, dies before the member, or should there be a failure of a proper designation of beneficiary, then in all such cases the amount due upon the certificate shall be paid to the person or persons who may be entitled to it in the order prescribed by the constitution, that is to say, in the order that has just been mentioned; so that if regard is had only to the certificate and the constitution, Mrs. McDougall having died, the money is payable to the adopted child.

The contention that is now being made in the name of the executor is that the Ontario Insurance Act has displaced this scheme of provision of benefits established by the Brotherhood to the extent—and it is only with this that we are concerned—to the extent at least that, the beneficiary named having died, the member, Mr. McDougall, had the right to dispose of the proceeds of the policy in the manner in which he has attempted to dispose of them by will, and that his will is effective for the purpose. As I said during the course of the argument it is, perhaps, strange, if that is the effect of the Act, that McDougall should, by statute, have acquired a right to make the Brotherhood pay money to his creditors when the whole plan of the Brotherhood was to provide a fund for him or his dependants. But, however strange the result may be, effect must be given to the Act if that is what the proper interpretation requires.

It is necessary, then, to examine the provisions of the statute.

In the statute, The Insurance Act, R.S.O. 1937, c. 256, are a good many provisions which have been discussed. I shall not mention them precisely in the order in which they appear in the statute.

By s. 130 it is enacted that a contract is deemed to be made in Ontario (a) if the place of residence of the insured is stated

in the application or the policy to be in the Province. McDougall's place of residence is in the certificate given as in Ontario.

In s. 131 it is enacted that every contract of insurance shall be evidenced by an instrument in writing called throughout Part V. of the Act a policy. This certificate, then, evidencing in so far as it does evidence the contract, is a policy.

Then s. 129(1) says that notwithstanding any agreement, condition or stipulation to the contrary, Part V. shall apply to every contract of life insurance made in the Province after the first day of January, 1925, and any term in any such contract inconsistent with the provisions of the Part shall be null and void; and by s. 129(4) where Part V. applies to any contract the rights and status of beneficiaries and the powers of the assured with regard to the designation or appointment of beneficiaries and the apportionment of the insurance money shall be governed by the provisions of the Part; so that taking just those sections alone we have a contract made in Ontario and any term of it that is inconsistent with the provisions of Part V. is null and void, and the powers of the insured with regard to the designation or appointment of beneficiaries are governed by the Ontario Act.

Now the power that an assured person under the Ontario Act has upon the death of a sole designated beneficiary of the preferred class is set forth in s. 160(3). In the case of the death of a preferred beneficiary before the maturity of the contract, and in the absence of any provision in the contract or a declaration by which some other person of the class of preferred beneficiaries is to become entitled to the insurance money appointed to the deceased beneficiary, the assured may deal under s. 153 with the insurance money or part thereof in the same manner and to the same extent as if the deceased beneficiary had not been a preferred beneficiary; and looking at s. 153, we find that s. 160(3) means that the assured may, in the circumstance stated, amongst other things, divert the insurance money wholly or in part to himself or his estate. We have it then, that unless in the particular contract with which we have to deal, or in some declaration that had been made by McDougall prior to his wife's death, some person in the class of preferred beneficiaries was to become entitled to the insurance money to which Mrs. McDougall would have been entitled had she lived,

McDougall the assured could divert the money to his estate. There was no previous declaration, so that can be left out of consideration, and the question then is whether in the contract there is a provision by which some person in the preferred class is, so to speak, to take Mrs. McDougall's place.

Now, I have said that the scheme of the insurance was that in the event of Mrs. McDougall's death, the adopted daughter should take her place, but that is not to say that in the "contract" as the word is used in the statute, there is a provision to that effect. I have stated the effect of s. 129(1) and (4), and there must also be considered s. 134. By s. 134(1), except in the case of a contract made with a fraternal society, no term or condition of a contract of insurance which is not set out in full in the policy or in a document or documents in writing attached to it when issued shall be valid or admissible in evidence to the prejudice of the insured or a beneficiary. In s. 134(3) are special provisions for permitting in the case of a contract of insurance made by a fraternal society a reference to the Act of incorporation of the society and to its constitution and laws, but by the definition contained in s. 128(9), as the Brotherhood is not incorporated, it does not rank for the purpose of this section as a fraternal society.

Some question as to the precise status of the Brotherhood arose during the course of the argument and it was thought wise to obtain a full and precise statement from the general counsel of the Brotherhood. Such a statement has now been produced and the question as to whether the Brotherhood could, in any sense, be considered a corporation has been disposed of, and it is not argued on behalf of the guardian that the provisions of s. 134(3) can be made applicable. It is argued, however, that there is nothing in s. 134(1) to prevent the Court, for the purpose of ascertaining the real contract of insurance, to refer to the constitution. It is pointed out that the certificate is in itself incomplete. One cannot fix, by reference to the certificate alone, the sum that McDougall was to pay by way of premium, if "premium" is the proper expression, or the persons to whom the insurance money is to go by the terms of the contract in case the named beneficiary dies before the member, and so on; and there has been much consideration of some of the relevant authorities, in particular, the judgment of MacLennan, J.A., in *Wintemute v. Brotherhood of Railroad Trainmen* (1900), 27

O.A.R. 524 where, dealing with a statute which was not precisely the same as the present Act, he said that evidently what the Legislature meant was this: "If there is an instrument, or perhaps more than one instrument referring one to the other, constituting a sufficient contract of insurance, then the effect of that contract is not to be modified or impaired by any term, condition, stipulation, warranty or proviso, not set out in full on the face or back of the instrument." That statement followed his statement that if the Act meant that the certificate alone is the whole contract, because by the first clause all the terms and conditions were to be set out, then there would be, in the case with which he was dealing, no sufficient contract of insurance at all, for there would be nothing to show what sum was agreed to be paid; and he came to the conclusion that the effect of the statute, or the effect in the case that he was discussing, was no more than I have stated. Well, be that as it may, we have in the present statute an express statement that the powers of the assured with regard to designation or appointment of beneficiaries and the apportionment of the insurance moneys are to be governed by the provisions of the Act, and that no term or condition of the contract which is not set out in full is to be valid to the prejudice of the assured. It would be to the prejudice of the assured, if he had the statutory right in the circumstances of this case to designate his estate as the beneficiary, to deprive him of that right, and s. 129(4) as I read it expressly gives him that right; and so I cannot see—and I do not think any analysis of the cases that have been cited will help very much upon this point—I cannot see, I say, how it is open to me to look at the constitution for the purpose of finding in it something that deprived him of the right; and I think, therefore, that I am not entitled to find that there was in the contract a provision by which, on the death of Mrs. McDougall, someone else became entitled to the insurance money. If there was such a provision, then the assured, McDougall, had not under s. 153 the power which he has professed to exercise. But I think the "contract" means the contract evidenced in the way required by statute, and that if there is no provision evidenced in the way the statute requires then McDougall had that power.

Now that is the main question in the case, and as already indicated my opinion is that as regards that contention that has been discussed the executor's position is sound.

The other question is this. The power under s. 153 arises only upon the death of the designated preferred beneficiary. The declaration, with which we are concerned, was made by a will executed in the lifetime of the preferred beneficiary. Obviously no declaration in favour of the estate and operative immediately could then have been made, and it is contended that although the will could have no effect as a will during the lifetime of the testator, the state of affairs existing at the time when the will was made is to be considered, and not the state of affairs existing at the time when he died. We have discussed s. 26(1) of The Wills Act, R.S.O. 1937, c. 164, which does not say as is sometimes assumed, that every will shall speak from death, but only that every will shall be construed with reference to the real estate and personal estate comprised in it to speak and take effect as if it had been executed immediately before the death of the testator unless a contrary intention appears by the will. But giving the narrowest construction to that section, or without considering the section at all, I cannot see how the fact that the testator made his will at a time when he had no power to do what he was professing to do touches the case. He, from the time of making his will until he died, presumably desired to deal with the insurance money in the way in which he purports to deal with it in the will. At the time of his death when the will became operative it expressed the desire that he had at that time, and at that time he had the authority which the statute gives; and so I think that the will, notwithstanding all that has been said against it, is effective. Upon this point I have been referred to *Re Cole* (1916), 36 O.L.R. 173, 29 D.L.R. 492, which I am not going to discuss at length as it is now so late, and about which I say only that I do not think that in it Falconbridge C.J.K.B. was, as I read his judgment, holding what counsel for the guardian asks me to hold, and I have also been referred to *Re Wythe*, 60 O.L.R. 323, [1927] 2 D.L.R. 1161. So far as it goes, or so far as it bears on the present case, I take the judgment of Masten J.A., in which Smith J.A. concurred, to be rather against the contention of counsel for the guardian. The document in that case, being no will at all, was simply treated as a continuing attempt to exercise the power given by the statute, which attempt became effective when the condition contemplated by the statute arose.

I am greatly indebted to counsel for the care that they have taken in the presentation of the case, and the help that they have given me in deciding what I have found to be rather a difficult question of law. Perhaps I have taken more of their time than I ought to have taken by encouraging them to discuss the case very fully. I did so with the object of becoming informed, so that I might perhaps safely give judgment at the conclusion of the argument. I think that what they have done for me has put me in a position to give judgment, and I have given it, and I am, as I have said, grateful to them.

Order accordingly; costs of all parties, including costs of first motion, to be taxed and paid out of fund.

Solicitors for the executor and trustee: Symons, Heighington & Symons, Toronto.

Solicitor for the guardian: Waldon Lawr, Toronto.

[ROSE C.J.H.C.]

Re Gray.

Barristers and Solicitors—Discipline—Disbarment and Striking off Rolls—Powers and Duties of Discipline Committee and of Convocation—The Law Society Act, R.S.O. 1937, c. 221, ss. 44 et seq.

The effect of s. 44 of The Law Society Act, R.S.O. 1937, c. 221, providing for the disbarment of a barrister who "is found by the benchers, after due inquiry by a committee of their number or otherwise, guilty of professional misconduct", etc., is to provide alternative modes for the "due inquiry" which is required. It may be made either by all the benchers or by a committee; if it is made by a committee *i.e.*, the discipline committee, and that committee, after hearing the evidence, finds that there has been misconduct, it is not necessary that all the other benchers, when the committee's report is before Convocation for action, should consider the evidence which was before the committee, and review its finding. *Re Crichton* (1906), 13 O.L.R. 271 at 295-6; *Re Washington* (1893), 23 O.R. 299 at 312, considered and distinguished.

The applicant herein, who had been disbarred by Convocation after his conviction by a criminal court for theft, contended that the discipline committee had proceeded upon a wrong principle, in that, instead of holding an independent inquiry into the question of the applicant's guilt, they had based their report upon the fact that the applicant had not shown them that the conviction was wrong. *Held*, it was unnecessary to decide whether the committee was bound to review the finding of the criminal court, since the review in fact was had, and the committee came to the conclusion that the conviction was correct. *Quaere*, whether a motion, under s. 47 of the Act, to set aside the Registrar's order striking a name from the rolls of barristers and solicitors, should be made in Court or in Chambers.

A MOTION to set aside the order of the Registrar, under s. 47 of The Law Society Act, R.S.O. 1937, c. 221, striking the

applicant's name from the roll of barristers and solicitors, and for other relief, more fully set out below.

The applicant was convicted in the County Court Judges' Criminal Court of theft, and was released on suspended sentence. An appeal from this conviction was dismissed by the Court of Appeal. The conviction having been brought to the attention of the secretary of the Law Society, a complaint was formulated and served upon the applicant, who appeared before the discipline committee. A transcript of the evidence taken at the criminal trial was before the committee, by consent, and additional evidence was heard, at the request of the applicant, directed chiefly to showing that the conviction was wrong. After hearing this evidence, the committee reported that it considered "that there was no fundamental error in the decision of His Honour Judge Parker which would justify the Committee in coming to the conclusion that he erred in convicting the Solicitor." The committee accordingly found that the applicant had been guilty of professional misconduct and conduct unbecoming a barrister and solicitor, and recommended that he be disbarred and that his name should not be permitted to remain on the rolls of the Society.

This report came before Convocation, and was referred back to the committee to permit the applicant to produce further evidence, and for further consideration. Additional evidence was heard, and the committee "decided that the evidence was not such as could warrant any change in its former report." It accordingly confirmed the findings in the first report, and renewed its recommendations.

On 19th November 1942 Convocation disbarred the applicant and resolved that he was unworthy to practise as a solicitor. Pursuant to s. 45 of The Law Society Act, notice of this action was given to the Registrar of the Supreme Court, who thereupon made an order, under s. 47, striking the applicant's name from the rolls.

The present motion was "by way of appeal from the Praeceptum Order of the Registrar herein, dated November 19th, 1942, and for an Order restoring the name of the Solicitor to the Rolls, and for a Writ of Certiorari directed to the Law Society to deliver to this Court all records and proceedings held by the Law Society and the Benchers or Committee thereof in connection with the Solicitor herein, and for an Order of Prohibition direct-

ing the Law Society not to interfere with the Solicitor practising his profession of Barrister and Solicitor, and for such further and other relief as to this Court may seem fit and proper". The principal grounds of attack on the proceedings, as set out in the notice of motion, were as follows:

1. The benchers did not themselves find the applicant guilty, after due inquiry, but merely adopted the report, and thereby the finding, of the discipline committee.

2. The discipline committee proceeded upon a wrong principle in that they based their report on the fact that the applicant had not shown that the conviction was wrong, which precluded them from passing upon the evidence and generally conducting the inquiry as they would have done if there had not already been a conviction.

3. Evidence was taken on three separate occasions, with different members of the committee in attendance. Although nine benchers in all took part in the hearings of the committee, only two heard all the evidence. By the Rules of the Law Society, three benchers are required to constitute a quorum.

15th December 1942. The motion was heard by ROSE C.J.H.C. in Chambers at Toronto.

J. J. Gray, the applicant, in person.

R. C. H. Cassels, K.C., for The Law Society of Upper Canada, respondent.

ROSE C.J.H.C. (orally, at the conclusion of the argument):— I do not think it is possible for me in this proceeding to grant any of the relief asked for in the notice of motion.

There was given to the senior registrar of the Supreme Court the notice provided for by s. 45 of The Law Society Act, R.S.O. 1937, c. 221, that the solicitor had been disbarred. Upon receipt of that notice it was, under s. 47, the duty of the registrar to draw up an order striking the solicitor off the roll, and the order was drawn up accordingly. It is an order which by the Act may be set aside or varied at any time by the Court.

I pass over for the present purposes the question whether as a result of the statute and Rules 205 and 207 I have power, sitting in Chambers, to make the order that is asked for. If I thought that my jurisdiction depended upon my being in Court rather than in Chambers, I should be inclined to adjourn into Court; but I do not think that the question is really that some-

what formal question of practice. The Court—and that means a judge, whether sitting in Chambers or sitting in Court, as may be requisite—has power to set aside or vary the order; and I take it that there is no doubt—indeed, Mr. Cassels seems to concede—that if it appeared that the benchers were without any jurisdiction to pass the resolution which they did pass, so that the notice given under s. 45 of the Act could be treated as a nullity, the power to set aside the order would exist; and, indeed, it would be the right of the solicitor to have that power exercised. But, although Mr. Gray contends that the benchers were in the circumstances of the case without jurisdiction, I think that really what he is asking me to do is to review their judgment and to say that in all the circumstances of the case they ought to have reached a decision the reverse of the decision that they did reach. His point as to jurisdiction is really that the report of the discipline committee upon which Convocation acted was defective in that it did not set out facts but only conclusions, and that Convocation was not by the report itself put in possession of the facts upon which there was to be decided the question whether unprofessional conduct had or had not been established. Another branch closely connected with the first of his questioning the jurisdiction of the benchers is in his contention that it was the obligation of every bencher to read the report of the evidence taken by the committee and upon that evidence to reach his individual conclusion as to whether the report ought or ought not to be adopted.

The answer to the question raised depends upon the true reading of s. 44 of the Act. The section says that where a barrister or solicitor is found by the benchers, after due inquiry by a committee of their number or otherwise, guilty of professional misconduct, and so on, the benchers may act. On that section the due inquiry may be made by the benchers themselves or by the committee. If the committee makes the inquiry, I do not quite grasp the reason for the suggestion that the benchers themselves must proceed to consider all the evidence that was before the committee and to review the finding of the committee. In this I am to some extent troubled by what was said by Mr. Justice Mabee in *Re Crichton* (1906), 13 O.L.R. 271, at pp. 295-296, and apparently concurred in by the Chancellor at p. 280. The Court there was considering a statute, or a section of a statute, somewhat similar to s. 44 of The Law Society

Act. The statute (The Ontario Medical Act, R.S.O. 1897, c. 176, s. 35(1)) gave to the council set up under it certain powers of discipline, and proceeded: "The Council shall for the purpose of exercising in any case the powers of erasing from and of restoring to the register the name of any person . . . ascertain the facts of such case by a committee of their own body . . . and a written report of the committee may be acted upon for the purpose of the exercise of the said powers by the Council." The section is a little different from s. 44 of The Law Society Act in that what the committee under The Ontario Medical Act was to do was to ascertain the facts of the case, whereas under s. 44 of The Law Society Act the benchers are given power to make a finding after due inquiry by a committee, so that apparently the function of the committee under The Ontario Medical Act was more limited than the function of the discipline committee set up under The Law Society Act. But in the *Crichton* case Mr. Justice Mabee does seem to say that the members of the Council—it is to be noted that I am reading the word "committee" in the last line on p. 295 as a misprint for "Council"—may not act on the report of the committee alone but ought to read the evidence taken before the committee, and the Chancellor on the page that I have referred to seems to concur in this remark. But the difference between the powers of the committee set up under The Ontario Medical Act and the discipline committee to which reference has been made, is to be borne in mind, as are also the circumstances of the case with which the Court was dealing, and I do not think that the expressions of opinion referred to are to be read as binding me to hold that each bencher in the present case, before voting for or against the adoption of the discipline committee's report, was bound to read the whole of the evidence taken before the discipline committee, or that it can possibly be said that the benchers, because some, or, if you like, most of them had not read that evidence, were without jurisdiction to vote for the adoption of the report.

The same kind of analysis would lead me to think also that the statement in what Mr. Justice Mabee refers to as *Dr. Washington's* case (*Re Washington* (1893), 23 O.R. 299) is not binding as an authority in the present case. The remarks are at the foot of p. 312 of the report.

I think, then, that as far as formal jurisdiction goes Convocation was not by any failure on the part of the discipline committee to make a proper report, or by any failure of any member of Convocation to do his duty, or his full duty, deprived of the power to pass the resolution which was passed and which is the basis of the Registrar's order. In fact the first report of the discipline committee is quite full, and it indicates that the committee acted upon what Mr. Gray says is the proper conception of its functions, that is to say, did not content itself with a mere finding that the solicitor had been convicted of the offence stated in the opening paragraph of the report, but did review the decision of the County Court Judge. The question, then, whether the committee was bound to review, or ought to have reviewed, the finding, does not arise, because the review was had and the committee, whatever individual members may have thought or said during the course of the discussion, came to the conclusion that the decision of the judge was correct. And, again, in the second report, after the matter had, apparently at the instance of the solicitor, been referred back to the committee and further evidence had been taken, the committee reaffirmed its former finding. So I come back to the point from which I started, that whatever the form of this motion may be, I think that in substance what I am asked to do is not to determine that the act of the committee or of Convocation was a nullity in the sense that has been contended for, but rather to review all the proceedings of the committee and of Convocation and to reach the conclusion that there was error in deciding in the way in which the committee and Convocation decided, that is to say, to entertain an appeal. It is not contended that I can hear an appeal, or that any appeal lies; and if I am right in thinking that what I am asked to do is in effect to hear an appeal, that is the end of the matter.

It may be noted in passing that in *Re Crichton* and also in *Re Washington* the Court was hearing an appeal, the right to which was given by statute. Here, there is no such right. It is to be noted also that certain other cases, indeed, as far as I know, most other cases, in which this kind of review of the action of a corporate body prejudicial to one of its members has been had were actions by the member against the corporation; and without laying it down that there could be in an action by the solicitor against the Law Society the kind of re-

view that is sought, I think I may express the opinion that if the power to enter upon such a review exists at all, it must be in an action rather than in such a proceeding as is before me.

For those reasons I think that the motion must be dismissed. Do you ask for costs, Mr. Cassels?

MR. CASSELS: Yes, if it pleases your Lordship to grant them.

HIS LORDSHIP: I suppose there is no reason why the costs should not follow the event.

MR. GRAY: My Lord, there is one very important point. Your Lordship said that the first report of the committee said that the judgment of Judge Parker was correct. I think that what was said was that it was not proved incorrect.

HIS LORDSHIP: Paragraph 8 of the report speaks for itself. Perhaps any attempt to paraphrase it would be a mistake. At any rate it does not indicate that the members of the committee found themselves at variance with the judge.

Motion dismissed with costs.

*Solicitors for The Law Society of Upper Canada, respondent:
Blake, Anglin, Osler & Cassels, Toronto.*

[HENDERSON J.A.]

The City of Belleville v. The Public Utilities Commission of The City of Belleville.

Public Utilities—Municipal Ownership—Powers of Municipal Public Utility Commission—Capital Expenditures—Issue of Debentures—The Public Utilities Act, R.S.O. 1937, c. 286, ss. 31, 33(1), 35, 36(1), (4), 44—The Municipal Act, R.S.O. 1937, c. 266—The Local Improvement Act, R.S.O. 1937, c. 269, s. 2(e), (j).

A public utility commission, established under The Public Utilities Act, R.S.O. 1937, c. 286, receives, immediately upon its creation, all the powers conferred by the Act; these powers are not limited by the fact that the by-law constituting the commission entrusts to it only the "control and management" of a utility. Such a commission has no power to raise money by the issue of debentures, or to incur an expenditure which it has not sufficient funds to meet; the Act clearly preserves to the municipal council the right to provide moneys for a public utility work, or to refuse to do so, in its own discretion. *Re City of Berlin and Breithaupt* (1914), 6 O.W.N. 423, considered. On the other hand, the commission has a right to use surplus revenues collected by it in any way it sees fit, and where these revenues have been paid over to the municipality, under s. 44 of the Act, it is entitled to have those moneys held to the credit of its account until it has determined that they are not required for its purposes, i.e., the purposes of the work under its control. It is only after such a determination by the commission that the moneys can become part of the general funds of the municipality, and be applied as provided in s. 31.

AN action for injunctions and other relief, fully set out in the judgment. For the reasons for judgment of Greene J., on an application for an interlocutory injunction, see [1942] O.W.N. 520, [1942] 4 D.L.R. 205.

2nd December 1942. The action was tried by HENDERSON J.A. without a jury at Belleville.

J. C. McRuer, K.C., A. B. Collins, K.C., and F. G. Cushing, for the plaintiff.

R. L. Kellock, K.C., and Charles Payne, K.C., for the defendant.

21st December 1942. HENDERSON J.A.:—This is an action by the Corporation of the City of Belleville, praying for the following relief:

1. (a) An injunction restraining the defendant and its officers, attorneys, servants or workmen from constructing, erecting, or purchasing a reservoir for use in connection with the waterworks system of the city of Belleville unless and until so authorized by the municipal council.

(b) An injunction restraining the defendant, etc., from entering into any contract for the construction, erection or purchase of a reservoir for use, etc.

2. An injunction restraining the defendant, etc., from using any of the surplus moneys derived from the operation of the waterworks system of Belleville, and any securities in which such surplus funds have been invested by the defendant for the construction, erection or purchase of a reservoir or for payment of all or any of the moneys due or to fall due and payable by the defendant in respect of any contract at any time entered into by the defendant for the construction, erection or purchase of a reservoir unless and until the construction, erection or purchase of such reservoir be duly authorized by the council of the plaintiff.

3. An order declaring that the bonds and debentures referred to in the statement of claim are the sole property of the plaintiff, and that the defendant has no right, title or interest therein, or right of control of the same.

4. An order declaring that all surplus moneys derived by the defendant from the waterworks system, and paid to the plaintiff, are the sole property of the plaintiff, and that the

defendant has no right, title or interest therein or right of control of same.

And for directions, etc.

It appears in evidence that by its by-law no. 3300, passed on the 7th day of December 1936, a question was submitted to the electors of the city of Belleville for an expression of opinion as follows:

“Are you in favour of the formation of a Public Utilities Commission under the provisions of The Public Utilities Act in which would vest the control and management of all utilities owned and/or operated by the Corporation of the City of Belleville?”

By by-law no. 3325 passed on the 15th day of February 1937, it is provided that the Commission theretofore established under the provisions of The Public Utilities Act and known as The Hydro-Electric Commission, shall thereafter be established and known as “The Public Utilities Commission of the City of Belleville”, and that from and after the establishment of the said Commission “the control and management of the Public Utility commonly known as The Belleville Water Works, including the entire System as owned and operated by The Corporation of the City of Belleville, shall be entrusted to the said The Public Utilities Commission of the City of Belleville”, along with other provisions not necessary to quote.

On 24th March 1942, the secretary of the Commission addressed a letter to the mayor and aldermen, referring to the fact that the Commission had engaged a firm of consulting engineers to make a report on the waterworks system, and that among other things it was recommended that a storage reservoir of one million gallons be constructed and that the works should be ready for operation early in June, and that the estimated cost was \$36,000; and further, “The Commission feels that the construction of the reservoir is both necessary and proper and as it may be necessary to ask the Council to issue debentures to pay for the work, the Commission would like to have your advice that you are prepared to issue the debentures.”

The next communication is a letter from the City Treasurer to the Commission dated 24th April 1942, calling attention to the fact that no report of revenues for the quarter ending 31st March has been furnished to the City.

The next communication is a letter from the City Clerk to the manager of the Commission advising that the request that the City of Belleville issue debentures for the construction of a new one-million-gallon storage tank at the waterworks plant had been submitted to council and voted on and lost.

The next communication is a letter of 2nd May 1942, from the secretary of the Commission to the mayor, enclosing the minutes of a meeting of the Commission of 21st April 1942, which contained, among other things, a resolution that the consulting engineers be requested to prepare plans and specifications, call for tenders, analyze bids and do whatever was necessary to proceed with the construction of the reservoir as outlined in their report, at once.

The next communication is a letter dated 13th May 1942 from the secretary of the Commission to the treasurer of the City, advising him that pursuant to s. 44 of The Public Utilities Act, the Commission has in its hand surplus revenues in the sum of \$15,000 represented by bearer bonds of the Dominion of Canada, \$5,000, and bearer debentures of the Province of Ontario of \$10,000. The letter further states as follows:

"The Commission within the very near future will erect a reservoir on certain property to be acquired by the Commission adjacent to the Filtration Plant and the moneys will be required for this purpose and possibly for other improvements to the Water Works of the Commission. You will, therefore, hold the securities just mentioned, to the credit of the account of the Public Utilities Commission of the City of Belleville and the income therefrom as and when paid to you, will also be placed to the credit of the account of the Commission. Under no circumstances must any part of the securities for money or the income received therefrom be transferred by you to the general funds of the Corporation of the City of Belleville, for the reasons hereinbefore appearing. If any of the funds are not required for the purpose of the Commission you will be duly notified of your authority to transfer the securities or the proceeds of the sale thereof, to the general funds of the Corporation."

The report of the engineers employed by the Commission, Ex. 10, discloses the recommendations in detail of the engineers, consisting of fifteen items, at an estimated cost of \$227,800, of which the sum of \$36,000 is the estimated cost of the reservoir, and the engineers recommend that this item "should be started

as soon as possible in order that tenders may be called for next February and the work completed and ready for operation early in June." The report is dated 30th September 1941.

I had the privilege of hearing very able arguments by counsel, including an analysis of the provisions of The Public Utilities Act, now R.S.O. 1937, c. 286, and I think it well to briefly review its provisions:

By s. 2, the corporation of a local municipality may acquire, buy, maintain and operate waterworks, and may acquire by purchase or otherwise and may enter on and expropriate lands, water and water privileges, etc. within or without the municipality, subject to certain limitations in distance.

By s. 4, the corporation may construct and maintain reservoirs, water and other works, plant and machinery, as may be requisite and necessary for the undertaking, and may by pipes or otherwise convey the water thereto and therefrom in, upon and through any land lying between the reservoirs and waterworks and the lake, river, pond, spring or stream of water from which the water is procured.

By s. 5, the corporation may sink and lay down pipes, tanks, reservoirs and other conveniences and from time to time alter their location or construction for the purpose of distributing the water.

By s. 25(1), "The council may pass by-laws for the maintenance and management of the works and the conduct of the officers and others employed in connection with them, and may also by by-law or resolution fix the rates or charges for supplying the public utility and the charges to meet the cost of any work or service done or furnished for the purpose of a supply of a public utility and the rent of or charges for fittings, apparatus, meters or other things leased or furnished to consumers and provide for the collection of such rates, charges and rents, and the times and places when and where the same shall be payable, and for allowing for prepayment or punctual payment such discount as may be deemed expedient."

By s. 30, the public utility works, and the land acquired for the purpose thereof, and the property appertaining thereto, shall be specially charged with the repayment of sums borrowed and for any debentures issued therefor, etc.

The provisions of s. 31 are important, and are as follows:

"31. Subject to the provisions of section 96 of *The Power Commission Act*, and notwithstanding anything in *The Municipal Act* contained, revenues arising from supplying any public utility or from the property connected with any public utility work, after providing for the expenses and maintenance of the works, shall be paid over to the treasurer of the municipality to be applied annually to the reduction or extinguishment of the rates required to be levied under any by-law for the issue of debentures of the municipality for the construction, extension or improvement of the works, and it shall not be necessary to levy any general rate to provide for sinking fund and interest or other payments on account of such debentures, except to the extent to which the revenues on hand are insufficient to meet the annual payments falling due on account of principal and interest of the debentures."

S. 33, subs. 1, is as follows:

"33. (1) Subject to the provisions of subsections 2, 3, 4, 5 and 6 the council of a municipal corporation which owns or operates works for the production, manufacture or supply of any public utility or is about to establish such works, and the council of a township corporation which has entered into a contract with The Hydro-Electric Power Commission of Ontario for a supply of electrical power or energy in the township, may, by by-law passed with the assent of the municipal electors, provide for entrusting the construction of the works and the control and management of the same to a commission to be called 'The Public Utilities Commission of the (*naming the municipality*),' or in the case of such township, 'The Hydro-Electric Commission of the Township of (*naming the township*),' or to a commission established under this Part."

Subss. 2, 3, 4 and 5 relate to villages.

By s. 35(1) it is provided that where a commission has been established under this Part as to any public utility, and the corporation desires to entrust the control and management of any other public utility works to a commission, such control and management shall be entrusted to the commission so established, or the by-law may provide for placing under the control and management of one commission all public utility works owned by the corporation.

S. 36 is important and reads in part as follows:

“36. (1) Subject to subsection 4, where a commission has been established under this Part and the members thereof have been elected or where the control and management of any other public utility works are entrusted to a commission established under this Part, all the powers, rights, authorities and privileges which are by this Act conferred on a corporation shall, while the by-laws for establishing the commission or entrusting it with such control and management remain in force, be exercised by the commission and not by the council of the corporation.

“(4) Nothing contained in this section shall divest the council of its authority with reference to providing the money required for such works, and the treasurer of the municipality shall, upon the certificate of the commission, pay out any money so provided, nor shall anything in this Act divest the council of the rights and powers conferred upon it by *The Local Improvement Act*.”

S. 44 reads as follows:

“44. The revenues, after deducting disbursements, shall, quarterly or oftener if the council so directs be paid over to the treasurer of the municipality, and shall be by him placed to the credit of the account of the public utility work, and if not required for the purpose of the work shall form part of the general funds of the corporation.”

By the order of the Supreme Court of Ontario of Wednesday, the 9th day of September, 1942, before the Honourable Mr. Justice Greene, the defendant, its officers, attorneys or servants were restrained until the trial of the action from entering into any contract for the construction, etc. of a reservoir and from using any of the surplus moneys or securities in which that surplus money had been invested for the construction of a reservoir, and I was referred to the reasons of Greene J., reported in [1942] O.W.N. 520, [1942] 4 D.L.R. 205, where the learned judge says in part:

“The by-law appointing the defendant commission only provides for the ‘control and management’ of an existing system, which raises a serious doubt as to whether such words would include the power to decide on the construction of a substantial addition to the system, and to make what would ordinarily be a capital expenditure from current revenue. However that may be, I do not desire to rest my decision on the wording of the by-law, but rather on the statutory division of powers between the council and the commission.

"S. 36 of the Act, 'subject to subsection 4', provides that 'all the powers, rights, authorities and privileges which are by this Act conferred on a corporation shall . . . be exercised by the commission and not by the council of the corporation.'

"It was argued on behalf of the commission that once it was established, all the powers of the municipal corporation passed to the commission under the above subsection, but that argument in my opinion overlooks the words 'by this Act', which is The Public Utilities Act. That Act does not confer any power on the corporation to raise money by the issue of debentures for the construction of a work. The corporation must look to The Municipal Act, R.S.O. 1937, c. 266, for such power, and it must be exercised by the council of the corporation in accordance with the provisions of The Municipal Act. Consequently the commission has no power to raise money except by rates for 'control and management.' The reservoir in question is only one part of a scheme of additions to the waterworks system, the cost of the total additions being estimated in the engineer's report at \$227,800. It is not my understanding of the policy of municipal legislation as a whole that expenditures on works of long life should be made out of the excess of rates collected over a few years, but rather that the work should be paid for by the issue of debentures for a term related to the life of the work."

I am in general accord with what I have just quoted. I am of opinion, however, that no power exists in the Commission to raise money by the issue of debentures or to incur an expenditure which it has not funds to meet. I am further of opinion that once the Commission was constituted, it had all the powers conferred by the Act on a commission, and is not limited by the words "control and management" in the by-law.

The governing provisions of the Act upon the issue raised here are in my opinion found in subs. 4 of s. 36 of The Public Utilities Act. In my view the right of the council to provide moneys for a public utility work or to refuse to do so in its discretion, is strictly preserved, and I can find nowhere anything to authorize a public utilities commission to embark upon the construction of a work, unless it has the money in hand to pay for it or the undertaking of the municipal council to provide such moneys.

In this connection I draw attention to the limitations upon the council of the municipality itself, to authorize the expenditure

of moneys unless they are to be provided by the issue of debentures authorized by by-law in accordance with some provision of The Municipal Act, R.S.O. 1937, c. 266, or in the alternative unless they are provided for in the estimates for the current year.

The judgment of my brother Middleton in *Re City of Berlin and Breithaupt*, upon a motion in Chambers, is reported in (1914), 6 O.W.N. 423. I have read the opinion of my brother Middleton with care. No reference therein appears to subs. 4 of s. 36, which was then subs. 3 of s. 35, and which did not contain the concluding clause of the present subs. 4 which I have quoted.

S. 2 of The Local Improvement Act, R.S.O. 1937, c. 269, defines the characters or descriptions of works which may be undertaken as local improvements and by clause (e) the construction, enlargement or extension of a water-main may be done as a local improvement, and by (j) "the extension of a system of water, gas, light, heat or power works owned by the corporation, including all such works as may be necessary for supplying water, gas, light, including street lighting, heat or power, to the owners of land, for whose benefit such extension is provided," may be done as a local improvement.

It was argued by Mr. McRuer that the concluding clause of subs. 4 of s. 36, by reserving to the council its powers under The Local Improvement Act, evidences an intention to vest in the council and to take away from the commission some of its rights in respect to a waterworks operated under its control, because such a work might be constructed as a local improvement, and the cost or part of the cost thereof assessed in the manner in which local improvements are assessed, namely, by imposing special rates on property specially benefited thereby.

In my opinion a waterworks plant could not be constructed as a local improvement for divers reasons, and further the provisions of The Local Improvement Act which I have quoted do not contemplate such a thing.

I can understand that in installing a waterworks system the commission might desire to have part of the cost of water-mains assessed as a local improvement on the properties served thereby, and in such case that this section would operate to prevent the commission from doing so, and to provide that only the council could make such assessments, and therefore that only the council could authorize debentures for the capital cost.

In my opinion a utility commission never had power to assess any part of the cost of waterworks as a local improvement.

As already indicated, in my opinion this subsection expressly limits the powers of the commission as stated in the opinion of my brother Middleton, and as already said, in my view the commission has no right to incur debts or to authorize debentures for capital expenditures until the municipal council has undertaken to provide the money. This does not, however, in my view, deprive the commission of its right to expend moneys in its hands, in full accord with the powers conferred upon it by subs. 1 of s. 36, read with subs. 2 and other sections conferring powers and authorities on the corporation prior to the establishment of a commission. The public utility work is the property of the corporation, but all that concerns the management, maintenance, operation, improvement and extension of such work is entirely in the discretion of the commission, subject only to the limitation imposed by subs. 4 of s. 36 already stated.

For these reasons I find in favour of the plaintiff for the relief claimed in paragraphs 1 and 2 of its prayer. I am, however, of opinion that no order can be made declaring that the bonds and debentures referred to are the sole property of the plaintiff, and that the defendant has no right, title or interest therein or right of control of same; also that no order can be made declaring that all surplus moneys derived by the defendant from the waterworks system and paid to the plaintiff are the sole property of the plaintiff, and that the defendant has no right, title or interest therein or right of control of the same. On the contrary I am of opinion that the defendant has a right, title and interest in these moneys, and the right to control the same to the extent of its powers, as I have endeavoured to describe them. Such moneys are past or future revenues of the Commission and have been or will be paid over to the treasurer as such, and the Commission is entitled to have them stand to the credit of the account of this public utility until the Commission has determined that they are not required for its purposes by which I mean the purposes of the work under its control.

It may well be that the present small surplus may be required by the Commission—new water-mains may be required at any time to replace those wearing out or for extensions and improvements, and there is no suggestion whatever in this case of any want of good faith, present or to be anticipated. It is also to be

remembered that instalments of principal and interest required to discharge debentures issued by the Corporation for waterworks purposes are to be paid out of revenues of the Commission, and it is in evidence that there are outstanding waterworks debentures of \$97,800 which, until they mature, require a total annual payment for principal of \$6,600 together with the current interest.

Upon the argument, in addition to the cases already mentioned, I was referred to *MacDougall, Sons and Company et al. v. The Water Commissioners of the City of Windsor* (1901), 31 S.C.R. 326. That case deals with a special Act of the City of Windsor which differs from the general Act, and the situation appears to me to be different from that in question here.

Reference was also made to *Scott v. Hydro-Electric Commission of City of Hamilton* (1914), 7 O.W.N. 385; and to *Re City of Berlin and The County Judge of the County of Waterloo* (1914), 33 O.L.R. 73, 22 D.L.R. 296; and *Re Public Utilities Commission of Thorold and Town of Thorold*, 60 O.L.R. 429, [1927] 3 D.L.R. 182; *Township of Stamford v. The Public Utilities Commission of the Township of Stamford*, [1942] O.R. 28, [1942] 3 D.L.R. 361. The last-named case raises an issue not raised here, and it would be impertinent for me to express an opinion as to it.

No order need be made as to costs, as the parties both represent the municipality.

Judgment accordingly.

Solicitor for the plaintiff: A. Bernard Collins, Belleville.

Solicitors for the defendant: Porter, Payne and Arnott, Belleville.

NOTE: The formal judgment in the above action, omitting the recitals, was as follows:

2. THIS COURT DOTH ORDER AND ADJUDGE that the defendant, its officers, attorneys, agents, servants or workmen be and they are hereby restrained

(a) from constructing, erecting or purchasing a reservoir for use in connection with the waterworks system of the City of Belleville unless and until authorized by the Council of the Plaintiff, or unless and until it has funds in the hands of the Treasurer of the Plaintiff available for the purpose of such work.

or the undertaking of the municipal council to provide such moneys.

(b) from entering into any contract for the construction, erection or purchase of a reservoir for use in connection with the waterworks system of the City of Belleville unless and until authorized by the Council of the Plaintiff, or unless and until it has funds in the hands of the Treasurer of the Plaintiff available for the purpose of such work or the undertaking of the municipal council to provide such moneys:

3. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the defendant, its officers, attorneys, agents or servants be and they are hereby restrained from using any of the surplus moneys derived from the operation of the waterworks system of the City of Belleville and any securities in which such surplus funds have been invested by the defendant for the construction, erection or purchase of a reservoir or for payment of all or any of the moneys due or to fall due and payable by the defendant in respect of any contract at any time entered into by the defendant for the construction, erection or purchase of such reservoir, unless and until the construction, erection or purchase of such reservoir be duly authorized by the Council of the Plaintiff or unless and until it has funds in the hands of the Treasurer of the Plaintiff available for the purpose of such work or the undertaking of the Municipal Council to provide such moneys.

4. Nothing herein contained shall be deemed to determine whether or when funds in the hands of the Treasurer of the Plaintiff are available for the construction of the work or works referred to in this action.

5. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that, save as hereinabove provided, this action be dismissed.

6. AND THIS COURT DOTH not see fit to make any order as to costs.

[ROACH J.]

Downing (Anglo-Canadian Music Company) v. The General Synod of the Church of England in Canada et al.

Copyright — Assignment — Validity — Registration — Infringement — Injunction and Damages—The Copyright Act, R.S.C. 1927, c. 32, ss. 12(2), 40(3).

The plaintiff, as assignee of the copyright of a musical work composed by W., sued the defendants for an injunction and damages for breach of copyright arising out of the publication of the work by the defendants in a hymn-book to be used throughout the Church in Canada. *Held*, on the evidence, the assignment alleged by the plaintiff had in fact been executed by W. in 1934, although the document itself had since been lost, and was a valid assignment under s. 12(2) of The Copyright Act, R.S.C. 1927, c. 32. Although the publication by the defendants was under a licence from W., still the defendants could not claim to be subsequent licensees for valuable consideration without actual notice within s. 40(3) of the Act, since their licence was not registered until after the registration of the plaintiff as owner of the copyright, and they had in any case actual notice. As between the defendants, the actual publisher, in the circumstances, having contracted to obtain the use of all materials at its own expense, was liable to indemnify its co-defendant, the church corporation. Further, the publisher was entitled to recover indemnity over against W. in third party proceedings, since the licence given by W. contained an express warranty as to title, and W., having assigned the copyright in 1934, had no right to grant the licence in 1938. *Sims et al. v. Marryat* (1851), 17 Q.B. 281, 117 E.R. 1287, applied. The fact that the publisher had actual knowledge of the plaintiff's copyright was no answer to its claim against W. on the express warranty, since the fact could be established only by parol evidence, which was not admissible to cut down or modify their respective rights and liabilities arising from the written documents. *Cato v. Thompson* (1882), 9 Q.B.D. 616, referred to.

AN action for an injunction and for damages for infringement of copyright. The facts are fully stated in the judgment.

9th and 10th June 1942. The action was tried by ROACH J. without a jury at Toronto.

R. G. Agnew, K.C., and *C. H. Weir*, for the plaintiff.

R. C. H. Cassels, K.C., for the defendant The General Synod of the Church of England in Canada.

Hamilton Cassels, K.C., for the defendant and third party, Oxford University Press.

C. H. A. Armstrong, K.C., for the third party, Healy Willan.

7th January 1943. ROACH J.:—The third party, Healy Willan, who is a British subject resident in Canada, is the author of a musical composition entitled "The Office of Holy Communion Set to Music by John Merbecke in the year 1550 with Organ Accompaniment by Healy Willan."

The plaintiff alleges that on or about the 6th day of April, 1934, Willan transferred and assigned to the plaintiff all his

right, title and interest in that musical composition and the copyright therein for the Dominion of Canada and all other countries, and that the plaintiff afterwards published the said musical composition in the Dominion of Canada.

In September, 1934, the defendant The General Synod of The Church of England in Canada, hereinafter referred to as "The General Synod", authorized a committee appointed by it to proceed with a revision of the Book of Common Praise, hereinafter referred to as "The Hymnal" and to submit a draft of the proposed revision to The General Synod. The committee in due course prepared such revision and the same was approved by The General Synod. By an agreement dated the 19th day of February, 1936, between a committee of The General Synod and Humphrey S. Milford, Publisher to the defendant Oxford University Press, which agreement was ratified by The General Synod on 31st August 1937, it was agreed that the publisher should print and publish such revised hymnal subject to the terms and conditions therein set out. Pursuant to this agreement the defendant Oxford University Press printed and published such revised hymnal. It was first published in the fall of 1938 and it contains parts of the musical composition of which Willan was the author.

In this action, the plaintiff, claiming to be the owner of the copyright in the said musical composition, claims that the portions thereof which are contained in the revised Hymnal were printed and published therein without his consent and that copies of the said Hymnal have been and are being sold by both defendants. Accordingly he alleges an infringement of his copyright and seeks an injunction restraining the defendants from further infringement of it and he claims damages and other relief appropriate in the circumstances.

By way of defence to the plaintiff's claim The General Synod denies that the copyright was ever assigned by Willan to the plaintiff, and pleads that if it was so assigned such assignment was not registered; that prior to the publication of The Hymnal both defendants obtained a licence and permission in writing from Willan to include portions of the said musical work in The Hymnal; that it gave valuable consideration for such licence and had no notice of the alleged assignment to the plaintiff.

The defence of Oxford University Press is substantially the same as that of The General Synod, except that it also pleads

that in 1933 Willan delivered the manuscript of the said composition to the plaintiff to be printed and published in sheet form by Oxford University Press for whom the plaintiff at that time was sole agent in Canada.

The issues, therefore, between the plaintiff and the defendants are as follows:

First: Was there ever a valid assignment of the copyright from Willan to the plaintiff?

The Copyright Act, R.S.C. 1927, c. 32, s. 12(2) provides as follows:

“The owner of the copyright in any work may assign the right . . . and may grant any interest in the right by license, but no such assignment or grant shall be valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorized agent.”

I think I must find on the evidence that there was an assignment in writing signed by Willan and delivered to the plaintiff in or about April 1934, whereby Willan transferred and assigned to the plaintiff all his right, title and interest in the musical composition entitled “The Office of Holy Communion Set to Music by John Merbecke in the year 1550 with Organ Accompaniment by Healy Willan”, including the copyright for the Dominion of Canada and all other countries, and as part of the consideration for the said assignment the assignor was to receive a royalty of ten per cent. on each and every copy sold after the first four hundred.

The foregoing assignment was not produced by the plaintiff at the trial. He swore with positive conviction that it was signed and delivered to him and explained that it and other documents which at one time were kept by him in a safety deposit box in his bank were removed to his office and had been lost. Willan, on the other hand, while far from admitting that he gave the plaintiff such an assignment, was not nearly as positive in his recollection of what had been done, and it seems to me that subsequent events and the part played in them by Willan are much more consistent with the plaintiff's evidence than with the theory that no such assignment had ever been given.

Reverend Canon Pilcher had induced Willan to produce this musical composition and when it was completed these two gentlemen went to the plaintiff to discuss the publication of the

work. Willan admits that at that time it was his intention to assign the copyright to the publisher. At that time the plaintiff was agent in Canada for Oxford University Press and after Willan's first discussion with the plaintiff some confusion arose in Willan's mind as to who was to publish this work, the plaintiff or Oxford University Press. This led to a further discussion between Willan and the plaintiff. Following that discussion the plaintiff wrote Oxford University Press giving the details of the arrangements entered into between him and Willan. That letter would not be evidence against Willan but at the trial it was shown to Willan and he agreed that it contained the substance of the agreement made between him and the plaintiff. It is Ex. 14. From that letter I extract the following significant portion:

"Dr. Willan is anxious to have an [*sic*] British edition put on the market and I promised to ask you to do this in the following way:—The work, of course, will be copyrighted by The Anglo-Canadian Music Co. and my own edition published in the ordinary way, and I would like, if you do not object, the title to bear an imprint with both our names similar to below,

Published by
The Anglo-Canadian Music Co.
Sole Agents for Canada for
The Oxford University Press
London, England

and both names to be of the same size. The English edition to be arranged entirely by yourselves and our name not to appear at all. My suggestion is that I transfer to you all rights of sale in Great Britain and her colonies and all other countries, excepting Canada, Newfoundland and the United States, which are the only markets that I have access to. No payment to be paid for these rights but the Oxford to be responsible directly to Dr. Willan for royalties on all copies sold of the British edition."

In due course a proof of the Canadian edition was printed by Oxford University Press and, through the plaintiff, was submitted to Willan for approval. Willan having edited the proof and approved the same, it was returned by the plaintiff to Oxford University Press which subsequently printed approximately two thousand copies for the plaintiff, and shipped them to him.

Upon this Canadian Edition appear the words "Copyright, 1934, by The Anglo-Canadian Music Co., Toronto, Canada." Willan observed this and did not at any time object to it.

Oxford University Press also printed a British edition and in each of the years from 1935 to 1940 inclusive paid Willan royalties on the sales of this edition.

The plaintiff did not pay Willan any royalties until July 1940, but in that month he paid Willan \$26.55 and Willan signed a receipt for that amount "being royalty to date."

On 11th September, 1940, the plaintiff wrote Willan stating that the assignment which Willan had given him in 1934 had been mislaid and he enclosed a "duplicate" with the request that Willan sign it. This "duplicate" did not provide for payment of a royalty and for that reason only Willan refused to sign it and so advised the plaintiff. The plaintiff then prepared another "duplicate" which included the provision for payment of the royalty and sent the same to Willan. Willan actually signed this one but did not return it to the plaintiff. He subsequently struck out his signature because, as he stated in evidence, he was in doubt whether he had ever signed an earlier one. This doubt apparently arose when Willan was unable to find a copy in his own records.

In view of the foregoing, I think I should accept the plaintiff's evidence that a valid assignment of the copyright was executed and delivered to him.

The copyright in the name of the plaintiff was not registered until 17th June 1940.

By a letter dated 15th February 1938, signed by Willan and addressed to W. H. Clarke, Manager of Oxford University Press, Willan granted permission for the inclusion in The Hymnal of those portions of the musical composition in question in this action. That letter, hereinafter referred to as the "licence" is as follows:

"You have my permission to use the following tunes and arrangements in the Book of Common Praise, Revised Edition 1938, in accordance with agreement with the Hymn Book Committee. So far as I know, no one else has any rights in these tunes". Then followed a list of the tunes and arrangements.

S. 40(3) of The Copyright Act provides that:

"Any grant of an interest in a copyright, either by assignment or license, shall be adjudged void against any subsequent

assignee or licensee for valuable consideration without actual notice, unless such assignment or license is registered in the manner directed by this Act before the registering of the instrument under which such a subsequent assignee or licensee claims”.

Willan had been retained to assist the revision committee in editing the revised Hymnal and for his services in that regard was paid the sum of two hundred and fifty dollars. He knew that Oxford University Press was printing The Hymnal for The General Synod. Accordingly, the permission or licence from Willan to Oxford University Press was also permission or licence to The General Synod.

The next question then is: Are the defendants subsequent licensees for valuable consideration without actual notice within s. 40(3) of The Copyright Act?

This licence granted by Willan to Oxford University Press was registered in the copyright office on 2nd May 1941. I do not think the defendants obtain any protection from s. 40(3) of the statute. This licence was registered subsequent to the registration of the copyright in the plaintiff's name and in any event each defendant had actual notice of the plaintiff's copyright prior to the granting of the licence. The correspondence between the plaintiff and Oxford University Press and the whole course of dealing between them constituted notice to Oxford University Press. The obligation of Oxford University Press to pay Willan royalties on the British edition was premised on the agreement which the plaintiff, as owner of the copyright, gave to Oxford University Press to publish the British edition outside Canada, Newfoundland and the United States of America, and as already stated, in recognition of that obligation, it paid royalties to Willan from 1935 to 1940 inclusive.

When the revised Hymnal was being compiled, the revision committee discussed with Willan the desirability of including portions of this musical composition in it. Willan endorsed this suggestion and gave the committee a printed copy of the Canadian edition on which, as I have already cited, was printed the notice that the plaintiff held the copyright, and Willan at that time stated that as far as he was concerned, it could be included.

The plaintiff is therefore entitled to succeed against the defendants.

In the third party proceedings between The General Synod and Oxford University Press, The General Synod claims to be indemnified against liability in respect of the alleged infringement under the provisions of the contract between them dated 19th February 1936, for the publication of The Hymnal. That contract contains the following provision:—

“(2) The Compilation Committee appointed in 1934, or such others as may be from time to time substituted for them, or any of them, shall select the hymns and tunes and all necessary matter for such revised hymn book, and furnish a copy thereof to the publisher, who shall, at his own sole cost, charge and expense not to exceed \$6700.00 as soon as the contract becomes operative, acquire and arrange for the use and purpose of such revised hymn book, and any and every edition thereof, and so far as practicable for any future revisions thereof as may be authorized, the copyright of and into [*sic*] such hymns and tunes as may be required for the purpose thereof. If the Publisher be unable to acquire the use of any hymn or tune selected by the Compilation Committee he shall forthwith notify them and they may substitute some other hymn or tune therefor.”

By way of defence to this claim for indemnity, Oxford University Press pleads an estoppel on the ground that The General Synod represented to it that it (The General Synod) had obtained authority for the publication of the musical composition in The Hymnal.

I do not think that any such representation has been established in evidence and even if it was made, Oxford University Press did not rely on it and therefore there could be no estoppel.

The General Synod is entitled to succeed on its claim to be indemnified by Oxford University Press against the plaintiff's claim.

In the third party proceedings between Oxford University Press and Willan, the former claims indemnity from the latter, and for that claim pleads the foregoing licence. In his defence Willan admits the said licence and simply denies that he thereby became liable to indemnify the licensee in respect of the plaintiff's claim.

When the foregoing licence was granted, no consideration was immediately paid therefor but it was well understood that a consideration was to be paid therefor and the exact amount of the consideration was subsequently agreed upon and paid.

There is no doubt that Oxford University Press was unwilling to print The Hymnal with this Communion Service in it without first obtaining the licence from Willan but just why it sought a licence from Willan instead of from the plaintiff as owner of the copyright does not appear. The inference is that in the interval between 1934 and 1938 the arrangements made by it with the plaintiff in 1934 had been forgotten.

Willan, of course, having assigned the copyright to the plaintiff in 1934, could not grant the licence in 1938. One wonders why he attempted to do so. I entirely exonerate him of any wilful fraud. I think he was just careless, and that he did not give the matter the consideration which it merited.

It appears to me that the licence contains an express warranty by Willan as to title. The words "So far as I know, no one else has any rights in these tunes" must be considered in the light of the fact that Willan was the author of those works and no one else could have any interest in them unless through him.

The case of *Sims et al. v. Marryat* (1851), 17 Q.B. 281, 117 E.R. 1287, is not unlike the case at bar. There the vendor, as executor of the deceased author, granted the defendant permission to publish the work "so long as the copyright may endure" the right to be "exclusively" the purchaser's for ten years. It was held that there was an express warranty as to title. In the case at bar Willan sold the licence with the affirmation that no one else had any rights in the tunes. In my opinion those words, coupled with the rest of the licence, are just as effective as if he had written "I expressly warrant that I have the right to grant the within licence."

The fact that Oxford University Press had actual knowledge of the plaintiff's copyright, as I have held it must be taken to have had, is no answer to its claim against Willan on the express warranty. As between them parol evidence is not admissible to cut down or modify their respective rights and liabilities which arise from the written document: *Cato v. Thompson* (1882), 9 Q.B.D. 616.

Oxford University Press is therefore entitled to succeed on its claim for indemnity against Willan.

There will therefore be judgment as follows:

I. In favour of the plaintiff against each defendant—

(a) For an injunction restraining it from printing, publishing or causing to be printed or published, and/or selling or causing to be sold or offered for sale or distribution in Canada, Newfoundland or the United States of America those parts of the musical composition in question in this action and identified by the following sub-titles and pages of Ex. 10, published by the plaintiff:

- i. "Responses to the Commandments"—p. 2.
- ii. "Before the Gospel"; and "After the Gospel"—p. 2.
- iii. "The Creed"—pp. 3 to 7 inclusive.
- iv. "Sursum Corda" (excepting the first two bars and the last bar thereof)—p. 7.
- v. "Sanctus"—p. 8.
- vi. "Agnus Dei"—pp. 8 and 9.
- vii. "Gloria in Excelsis"—pp. 10 and 11.

and as further identified in The Book of Common Praise (Revised 1938), Ex. 24, by the titles, numbers and pages following:

- i. "Kyrie"—No. 177, p. 933.
- ii. "Before the Gospel" and "After the Gospel"—p. 933.
- iii. "Nicene Creed"—pp. 851 to 854 inclusive.
- iv. "Sursum Corda"—No. 177, p. 935.
- v. "Sanctus"—p. 935.
- vi. "Agnus Dei"—No. 177, p. 936.
- vii. "Gloria in Excelsis"—pp. 855 to 857 inclusive.

(b) For damages for infringement of the plaintiff's copyright; and for the purpose of ascertaining the said damages a reference to the Master is hereby directed.

(c) For his costs of this action including the costs of the reference to the Master.

II. Directing the defendant Oxford University Press to deliver to the plaintiff all plates used by it in printing those parts of the said musical composition as they appear in The Book of Common Praise at the pages thereof hereinbefore indicated.

III. In favour of the defendant The General Synod of The Church of England in Canada against the third party Oxford University Press for such sum as The General Synod shall be required to pay the plaintiff by way of damages and costs and also for its costs against the third party in the third party proceedings herein.

IV. In favour of the defendant Oxford University Press against the third party Healy Willan for such sum as it may be required to pay to the plaintiff and/or the defendant The General Synod by way of damages and costs and also for its costs against the said third party in the third party proceedings herein.

Judgment accordingly.

Solicitors for the plaintiff: Agnew & Agnew, Toronto.

Solicitors for the defendant The General Synod: Blake, Lash, Anglin & Cassels, Toronto.

Solicitors for the defendant and third party Oxford University Press: Cassels, Brock & Kelley, Toronto.

Solicitors for Healy Willan, third party: Armstrong & Sinclair, Toronto.

[CHEVRIER J.]

The City of Galt v. Carroll's Limited.

Fraud and Misrepresentation—Lack of Belief as Fraud—Recovery of Money—Fraudulent Use of Relief Vouchers.

W., relief officer for the plaintiff municipality, improperly took relief vouchers of the municipality, which were clearly marked "This order must be returned . . . and no cash given", to the defendant's shop, which was authorized to accept the vouchers in exchange for groceries. The defendant's manager gave cash to W. for the vouchers, retaining a small amount as a "service fee", and later turned them in to the City, with other vouchers, which had been properly accepted and filled by the supply of groceries, for redemption. *Held*, although the fraud was initiated by W., yet the defendant, by its servants, had clearly made false representations, and obtained money thereby, and the plaintiff was therefore entitled to recover the money so obtained. The fact that the defendant's servants had no honest belief in the truth of the representation (that the vouchers had been filled by supplying groceries) was enough to make it fraudulent in law, without any proof of an actual fraudulent intent on their part. In the circumstances, since W. was engaged in a fraudulent course of conduct, the plaintiff was not bound by W.'s acts, or estopped. Review of authorities.

AN action for the recovery of \$7,691.36, alleged to have been obtained from the plaintiff by fraud, or, alternatively, under a mistake of fact. The nature of the claim, and the facts, are fully stated in the judgment.

21st to 24th April 1942. The action was tried by CHEVRIER J. without a jury at Kitchener.

J. J. Robinette and H. A. Stewart, for the plaintiff.

C. W. R. Bowlby, K.C., and C. V. Langs, K.C., for the defendant.

9th January 1943. CHEVRIER J.:—I. *The claim.* The plaintiff claims that from time to time, for the purpose of supplying relief to needy families residing in the plaintiff municipality, the plaintiff issued certain orders or vouchers for groceries and other goods, addressed to the defendant, each of which was a request to the defendant to supply to the recipient of relief, whose name appeared on the said order, groceries and other goods, as specified on said order; the said orders were issued for goods only and on the face of said orders it was printed that no cash was to be given. One Olive Wickens, then relief officer for the plaintiff, took certain of the said orders to the defendant's store in the city of Galt, and the defendant through its store manager paid to the said Wickens cash for the said orders, retaining a small service fee; the defendant each month forwarded to the treasurer of the plaintiff corporation the orders received, on which it had supplied goods to *bona fide* recipients, and with these orders, but without in any way differentiating them, it also forwarded to the said treasurer, the orders on which it had not supplied goods to the relief recipient named in the order, but for which it had paid to the said Wickens cash as already explained.

The plaintiff claims that the defendant had therefore falsely and fraudulently represented to the plaintiff that the defendant had supplied to certain alleged relief recipients certain goods in accordance with the terms of the said orders, whilst in fact it had not. The plaintiff also says that, believing the representations thus made, it paid to the defendant the sums represented by the said orders, whilst in fact, it says, the defendant had obtained some of the said orders by paying cash to the said Wickens and supplied no goods whatever;—and that as a result of such false representations made by the defendant's servants the plaintiff paid to the defendant the sum of \$7,691.36 on vouchers or orders that represented goods supplied whilst in fact it was for cash.

II. *The evidence.* Freeburn, the manager of the defendant's store at Galt, testified that the said Miss Wickens, the administrator of relief in that city, who had been granting relief vouchers of the City for groceries to the relievees of that city since 1937, told him that there was no municipal money available with which to pay the rent of those relievees, but that there was a surplus in the City's groceries fund; that she had per-

Jam or Peanut Butter or Ontario Honey
 Potatoes
 Tomatoes
 Turnips or Parsnips or Onions
 Carrots or Cabbage
 Dried Beans
 Apples (fresh) (when in season)
 Tea or Coffee or Cocoa
 Baking Soda
 Baking Powder
etc.....

total

 740

 This order herein was filled as above indicated

(Sgd.) Carroll's Ltd.

'O. Freeburn'

Merchant's signature."

The words underlined are in print. The words and figures not so underlined are written in. It will be noted that on the back of this Ex. 1A there appear in handwriting in the column "amount" the words "Groceries supplied for this amount."

Freeburn says that Wickens told him at one stage of these transactions that it was no longer necessary to set out names of groceries allegedly supplied, though in fact not supplied, but that it was enough simply to put down the above words. Later she said that it was no longer necessary for Freeburn to put those words down but just to fill in the amount and sign, and that a resolution had been passed to that effect. Here I do find as a fact that the words "Groceries supplied for this amount" in Ex. 1A, 1B, 1C, 1D, 1F, 1G and No. 425D forming part of Ex. 1 were written by the said Freeburn, manager of the said defendant's store at this time, and that all the signatures on the reverse side of the other vouchers filed as exhibits and purporting to bear the name of the manager of the defendant store at the time, were in fact the signature of the said manager.

Freeburn admits never having mentioned these transactions to, or discussed their nature with, the plaintiff's treasurer or with any member of council or of the Relief Board. He disclosed it to his supervisor West, and to Pope, whose duty it was to check the operations of the stores, but neither of them objected to it; he thinks he explained the matter to Lehman, who replaced him. He says he had no reason to doubt the good faith of Miss Wickens, and though he did not make it known to other

merchants, it was not a matter of secrecy in the store or with the staff, and he took it for granted that the city officials knew about it.

Miss Wickens was later arrested and found guilty of forgery; to charges of obtaining money under false pretences, she pleaded guilty, and was sentenced to six months in jail; all sentences ran concurrently. The transaction was a simple one. She brought the vouchers in form Ex. 1A to the witness, who delivered no groceries, but gave her cash for the sum called for by the voucher, which ostensibly was for groceries, less 50c. which remained with the defendant. Witness then describes at length the checking by means of recapitulation sheets (Ex. 7), the sending of monthly statements to the plaintiff's treasurer, and the receipt by him of the plaintiff corporation's cheque (for example Ex. 9).

From that evidence I find the following further facts:

1. The defendant's clerks knew that the vouchers in question did not cover groceries.
2. They knowingly represented to the plaintiff that they did.
3. The defendant company benefited to the extent of 50c. on each such voucher.
4. The plaintiff did not know that such vouchers were not given for groceries.
5. The plaintiff had no reason to believe that the vouchers had not been given for groceries.
6. There was no negligence whatever on the part of the plaintiff's clerks in accepting, and subsequently paying, the said vouchers.
7. The plaintiff acted in good faith upon the said representation in paying to the defendant the sums represented by the vouchers submitted.
8. Each such representation was in fact a misrepresentation.
9. The amount paid as a result of such misrepresentations is the sum of \$7,691.36.

10. The said sum was paid under mistake of fact.

III. *The Law.* Having found the above facts, I now proceed to deal with the law.

The plaintiff argues that these moneys were paid under a mistake of fact. The defendant says it was wilful fraud on the part of the plaintiff's relief officer.

The fact I find is, that the relief officer Wickens propounded and suggested the fraudulent scheme, but I also find as a fact that it was the defendant's clerks who, by their signature, knowingly and falsely represented that the said vouchers had been accepted for groceries, and that it was on those representations, which were false pretences, that the plaintiff's relief officer obtained the moneys.

(a) " . . . it may now be taken as established beyond all question that, whenever a man makes a false statement which he does not actually and honestly believe to be true, that statement is, for purposes of civil liability, as fraudulent as if he had stated that which he did not know to be true, or knew or believed to be false; . . . any misrepresentation made without actual and honest belief in its truth is fraudulent." (23 Halsbury, 2nd ed., p. 41). Here I find as a fact that when Freeburn and all the other agents of the defendant signed the vouchers purporting to have been given for groceries, he and they made false statements which he and they did not honestly believe to be true and which were therefore fraudulent.

(b) "Proof of this absence of actual and honest belief is necessary." (*ib.*) From the evidence I find as a fact that there was absence of actual and honest belief.

(c) " . . . the motive of the representor in making the misrepresentation is wholly irrelevant. It may be that he intended to . . . benefit himself without injuring the representee" (*ib.*, p. 42) I find as a fact that Freeburn and the others who acted as he did, did not intend to injure the plaintiff, but did intend to benefit the defendant.

(d) "In all these cases alike, provided only that there was an absence of actual and honest belief in the truth of his assertion, the misrepresentation is accounted fraudulent, and no proof of any wicked or other intention (other than an intention to induce) on the part of the representor is required by the law; or (as it is sometimes put), if it is necessary to establish an intention to deceive or to injure, such intention is immediately and irrebuttably presumed in law from the mere act of making the misrepresentation without such belief." (*ib.*, p. 43.)

"A misrepresentation must be either fraudulent or innocent . . . It follows, therefore, from the definition already given of a fraudulent misrepresentation, as connoting the absence of actual honest belief in its truth, that the connotation of an inno-

cent misrepresentation is the presence of such actual honest belief". (*ib.*, p. 45.)

Under the heading "Inducement" at p. 50, it is said, "It is sufficient to prove that the misrepresentation was an inducing cause, though it may not have been the inducing cause." I find as a fact that the representations made by the defendant's servants was the inducing cause, but I also find as a fact that the plaintiff's servant Wickens was engaged in a fraudulent course of conduct. "When once it is established that it had an influence on the mind and on the conduct of the representee, the law places no burden on him, and confers no right on the representor, of instituting a conjectural inquiry as to what would have happened if certain things had been said which in fact were not said, or had been said differently." I find as a fact that the representations made by the defendant's servants had an influence on the mind and on the conduct of the plaintiff's servants and justified them in issuing the plaintiff's cheques in monthly reimbursement to the defendant. "Further, if once it is shown that the misrepresentation was an inducing cause, it is no answer to suggest, or prove, that other considerations co-existed and co-operated with the misrepresentation in producing the result. These matters are *res inter alios actae*, and it does not lie in the wrongdoing representor's mouth to set them up. If, as against him, the misrepresentation was the sole inducement, it need not have been the sole inducement in any other sense."

In *Arnison v. Smith* (1889), 41 Ch. D. 348, Lord Halsbury L.C., at p. 368, said: "If men make a statement which is intended to be believed, and which when they make it they know to be untrue, I cannot agree that they may have no intention to deceive."

And in *Derry et al. v. Peek* (1889), 14 App. Cas. 337 at 374, Lord Herschell said: " . . . fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly . . . To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief."

From the facts as found and from the law as stated I conclude and find as a fact that the defendant's clerks fraudulently misrepresented to the plaintiff the nature of the vouchers ten-

dered for payment and that the plaintiff in good faith, and being thus deceived by such fraudulent misrepresentation, did by reason thereof pay the said aggregate sum of \$7,691.36.

I think it is only proper to say here, that in law the conduct of the defendant's clerks amounts to fraudulent misrepresentation, and that that is fatal in the case, but it is not my province to say to what extent, if any, such action as reviewed here transgresses the moral law. I think I should also add that such actions do not affect the character or honesty of those who are charged with them, nor do they reflect upon their integrity. They derived no personal benefit from them, and I would not want it to be understood that such findings as I have made constitute a blemish upon their reputation.

Therefore under the authority of *Kelly v. Solari* (1841), 9 M. & W. 54, 152 E.R. 24; *The London Joint Stock Bank v. Simmons*, [1892] A.C. 201 at 223; *Barwick v. English Joint Stock Bank* (1867), L.R. 2 Ex. 259; *Townsend v. Crowdy* (1860), 8 C.B.N.S. 477, the plaintiff should succeed. Yet there are further matters to be considered.

The defence submits that under the doctrine of agency the plaintiff is barred by the act of its agent Wickens.

Under the circumstances of the present case I must hold, relying, among others, upon the following cases cited by the plaintiff in answer to the defendant's contention, that the plaintiff is not in law bound, nor is it responsible for the acts of its employee Wickens. In *Cooper v. Parsons Realty Co.* (1915), 8 O.W.N. 487, Middleton J. said: "The rule that the knowledge of the agent is the knowledge of the principal is not of universal application, and does not apply where the agent is engaged in a fraudulent course of conduct." I have already found as a fact that the plaintiff's agent Wickens was engaged in a fraudulent course of conduct.

The headnote to *Rocco v. Northwestern National Insurance Co.*, 64 O.L.R. 559, [1930] 1 D.L.R. 472, is as follows:

"Insurance—(Automobile)—Untrue Statement in Application for Policy—Materiality—Policy Issued by Agent of Insurance Company with Knowledge of Untruth—Fraudulent Act of Agent not covered by his Authority—Estoppel—Knowledge of Agent not Knowledge of Company—Improbability of Agent Communicating his own Delinquency to his Superior Officers.

"Held, that the agent's authority from the company to issue policies for it did not include the right to deliver a policy containing a mis-statement which, to his knowledge, would make it void—his was a fraudulent act as against the company not covered by any authority; and, the misrepresentation being material, the company was not estopped, and the policy was void . . . notice to or knowledge of an agent is not notice to or knowledge of the company unless the circumstances are such as to justify the opinion that the agent will probably communicate the information to those in charge of the affairs of the company—and in this case it was unlikely that the agent would inform his superiors of his own delinquency." I find that the application of this principle is justified here in view of the findings of fact I have already made.

The defendant submits the following authorities, among others, in an endeavour to fasten responsibility on the plaintiff for the acts of its relief officer.

1 Halsbury, 2nd ed., p. 269, paras. 447, 448; *Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716 at pp. 725, 727, 733, 737, 740; *Hambro v. Burnand et al.*, [1904] 2 K.B. 10; *Bryant, Powis, and Bryant, Limited v. La Banque du Peuple*, [1893] A.C. 170, per Lord Macnaghten at p. 180.

The principles there enunciated are all sound principles of law and well recognized, but their virtue is effective only when the facts justify their application, and the facts in the present case do not justify their application.

The whole matter pivots on the deception and fraudulent misrepresentation of the defendant's employees to the plaintiff's treasurer that the said vouchers represented groceries. I therefore find as a fact that the *causa causans* is the fraudulent misrepresentation of the defendant's employees.

The plaintiff further submits the argument that wherever one of two innocent persons must suffer for the acts of a third, he who has enabled such third person to occasion the loss must sustain it. (*Lickbarrow et al. v. Mason et al.* (1787), 2 Term. Rep. 63 at 70, 100 E.R. 35). That principle is referred to in the case of *R. E. Jones, Limited v. Waring and Gillow, Limited*, [1926] A.C. 670, which was not cited on the argument, and which in my opinion is of apt application, and the plaintiff is, on that principle, entitled to succeed.

The defendant further submits, as another reason why the plaintiff should not succeed, that since the time at which the moneys were paid by them "their position has been altered to their disadvantage", *i.e.*, that the moneys were repaid monthly by the plaintiff to the defendant who had paid out the money in small sums at various times during the months. That contention, if it could be admitted, would be serious, but the doctrine does not apply, as I have found that the fraud was caused by the defendant's agents.

The plaintiff submits that the powers of a municipal corporation are to be exercised by by-law (s. 267) under the seal of the corporation (s. 276) as provided by The Municipal Act, R.S.O. 1937, c. 266, and that this not having been the case here, the plaintiff is not responsible for whatever was done by its relief officer Wickens, who had not been appointed by by-law, but who was acting as relief officer under the Relief Board, which in turn had never been authorized by by-law; it cites the case of *John Mackay and Company v. City of Toronto*, [1920] A.C. 208, 48 D.L.R. 151, [1919] 3 W.W.R. 253, and that of *Township of Pembroke v. The Canada Central Railway Company* (1883), 3 O.R. 503.

In *John Mackay and Company v. City of Toronto*, *supra*, Viscount Haldane expressed himself thus:

"Their Lordships see no reason to differ from the view taken by the majority of learned judges who decided the case, or to restrict the class of powers to which the statutory condition requiring a by-law applied to the class of legislative powers referred to by Gwynne J. Nor do they find any reason to so restrict that class in the present case which is governed by the existing Municipal Act."

In *Township of Pembroke v. The Canada Central Railway Company*, *supra*, the opinion is expressed that the provision that the powers of township councils shall be exercised by by-law must be construed as referring only to the exercise of powers of the council under The Municipal Act, and not to powers which may be exercised under a special act passed for other purposes or by another legislature.

It is true that there is no by-law appointing the relief officer, nor any constituting the Relief Board, which, I find as a fact, was in the circumstances of this case at least, only one of an advisory capacity. But it had been created as a result of the

general relief measures established by the Province, as complementary to the relief measures instituted by the Dominion Government, and as such it was, for the time being and for the purposes for which it had been created, an integral part of the machinery of municipal government, and required no by-law for its creation or for the carrying out of its purpose. In a proper case a corporation is bound by the actions of its servants. But here the case does not turn upon that point. I have found as a fact that the conduct of the plaintiff's servants was not the cause of the fraud, nor were they in any way responsible for the result, *i.e.*, the obtaining of the money by fraudulent misrepresentation or otherwise.

The defendant further submits that the plaintiff cannot succeed because it is bound by the statements made by its servant Wickens, *i.e.*, that it is now estopped from denying responsibility for the acts of Wickens, and cites Halsbury, *loc. cit.*; Ewart on Estoppel at pp. 35, 36, 498; Pike, Canadian Municipal Law, p. 7; Kerr on Fraud and Mistake 6th ed., p. 125; and *Farquharson Brothers & Co. v. C. King & Co.*, [1902] A.C. 325.

The plaintiff answers that there is nothing in the cases clearly to indicate that the same doctrine as is applicable to an individual applies with equal effect to a corporation. In support thereof the plaintiff submits the case of *Ottawa Electric Railway Co. v. City of Ottawa*, [1934] O.W.N. 265, where, at p. 267, Kingstone J. said:

"In dealing with the company the secretary of the City's engineering department and the roadway engineer assumed wrongfully that the City should pay for the cost of the removal. By adopting this course of conduct, is the City thereby estopped from asserting under the agreement its strict legal rights? . . . But here we have a City Corporation, a creature of statute, not having incidental to its powers the capacity of an individual or company to contract at common law; there was no by-law or authority from the City by agreement, but merely a course of conduct adopted by a department of the City, and, following the principle laid down in *John Mackay and Company v. The City of Toronto*, [1920] A.C. 208, the action or promises of a departmental official would not be binding on the City Corporation."

In the case of *City of Toronto v. Toronto R.W. Co.* (1918), 44 O.L.R. 308 at 317, 24 C.R.C. 255, 46 D.L.R. 435, Riddell J.

quotes Bowen L.J. in *The British Mutual Banking Company Limited v. The Charnwood Forest Railway Company* (1887), 18 Q.B.D. 714 at 718, as follows: "If they cannot contract, how can they be estopped from denying that they have done so?"

It is further submitted that the municipal council cannot delegate its legislative or discretionary powers unless there is authority to do so. Because of the peculiar situation existing here, in the matter of the relationship between the corporation and the Board, resulting from the nature of the principle to which the Board owes its existence, that submission has no application here.

The defendant further says that there was nothing to make the defendant's manager aware that Wickens was perpetrating a fraud. The plaintiff answers that what Wickens was asking the defendant's manager to do was, on the face of it, so glaringly not in accordance with the facts, and such a contravention of the stipulations expressed on the face of the voucher ("no cash is to be given", *inter alia*), that that alone should have at least placed the manager on his guard, and would naturally and logically, to an alert manager, have given rise at once to suspicions. So much is this so, that the defendant's manager testified that when he reported this arrangement to his supervisor Pope, after it had been in operation for a time, Pope said that he thought there might be an investigation in this matter at some time, but he did not order it to be stopped. That, I find, was enough to have aroused suspicion in the minds of the defendant's servants as to the *bona fides* of this proposition.

On the other hand I must, as I do, find as a fact that there is nothing in the whole of the evidence which could reasonably, to any alert mind, have given any intimation of something wrong, or even caused doubt, or given rise to any suspicion in the mind of the city treasurer, or any other officer of the plaintiff corporation connected with these transactions, of any bad faith or fraud or misrepresentation. There is evidence that if the treasurer had been informed or had known that the vouchers had been given not for goods, but for rent, he would not have issued the cheques, that he relied on the vouchers and on the recapitulation sheets. I find as a fact that there was no negligence on the part of the City's officials in the conduct of these transactions, and that the only one at fault was Wickens, for whose

conduct I have found that the plaintiff is not responsible in the circumstances of this case.

At the close of the plaintiff's case the defendant made a formal motion for non-suit. I reserved my decision. Such motion was not later renewed. In view of the evidence adduced in the plaintiff's case the motion is dismissed without costs.

For all these reasons the plaintiff is entitled to judgment for the sum sued for, namely, \$7,691.36, less the sum of \$137.04, which amount is admitted and is part of the counterclaim, which is dismissed without costs. There will therefore be judgment for the plaintiff for the sum of \$7,554.32.

The plaintiff is also entitled to its costs of this action.

Judgment for the plaintiff with costs.

Solicitors for the plaintiff: Dalzell & Stewart, Galt.

Solicitors for the defendant: Langs & Binkley, Hamilton.

[HOPE J.]

The Attorney-General of Canada v. C. C. Fields & Company.

Revenue—Share Transfer Tax—Collection and Accounting by Brokers—Duties of Brokers—Affixing and Cancellation of Stamps—The Special War Revenue Act, R.S.C. 1927, c. 179, ss. 58(1), 60, 62, 99, 100, 101, 102, 108(1), (2), as amended, and Regulations thereunder.

Where brokers, although they buy, on behalf of their customers, the stamps required as tax on sales of securities, fail to affix these stamps to duplicate memoranda of the sales, or to cancel them as required by the regulations made under The Special War Revenue Act, R.S.C. 1927, c. 179, the Crown, under s. 108(1) of the Act, is entitled to judgment against them for the amount of moneys, or the equivalent of moneys, so collected for and on behalf of the Crown. The obligation is a debt created by the statute, and the period of limitation is therefore twenty years. There can be no estoppel as against the Crown from the fact that its auditors have, in other cases, accepted less than full compliance with the regulations. The regulations in this respect are within the language of s. 60 of the Act, and are therefore *intra vires*.

AN action claiming judgment for \$51,487.43, and other relief. The facts, and the relief claimed, are fully stated in the judgment.

6th, 7th, 8th October 1942. The action was tried by HOPE J. without a jury at Toronto.

J. C. McRuer, K.C., and A. J. P. Cameron, for the plaintiff.

Hon. J. Earl Lawson, K.C., and G. P. Campbell, K.C., for the defendants.

13th January 1943. HOPE J.:—In this action the plaintiff sues on behalf of the Crown in the right of the Dominion, to recover from the defendants the sum of \$51,487.43 alleged to have been collected for and on behalf of the Crown from 1st June 1934, to 30th May 1940, under the provisions of The Special War Revenue Act, R.S.C. 1927, c. 179 and amendments thereto, and regulations passed thereunder, as a stamp duty imposed on the transfer or sale of unlisted securities effected by the defendants, either as vendors or as brokers for other vendors.

The defendants are a partnership of stockbrokers with head office in the city of Toronto, and having a seat upon the Toronto Stock Exchange.

The provisions of The Special War Revenue Act as amended and pertinent to the matters in issue herein, are found in ss. 58(1), 60, 62, 99, 100, 101, 102 and 108(1).

Under and by virtue of the statutory authority contained in s. 60 aforesaid, regulations have from time to time been established by the Governor in Council. Those regulations which are applicable are, firstly, those passed with effect from 26th May 1932, and reading in part as follows:

"2. Sales of Securities by Stockbrokers—Not executed on Stock Exchanges.

"That where any stockbroker, acting either as principal or agent, effects the sale of a taxable security by means of a transaction which is not executed on a stock exchange in Canada, the tax exigible on the transaction is to be paid to the Crown by the vendor stockbroker affixing excise tax stamps of the requisite value to the duplicate of the memorandum of sale retained on file in his office."

"12. Sales Records Required to be kept by Stockbrokers, Banks, Trust Companies and Bond Dealers.

"That where any stockbroker, bank, trust company, or bond dealer, acting either as principal or agent, effects the sale of a taxable security, such stockbroker, bank, trust company, or bond dealer be required in all instances where the transaction is not executed on a stock exchange in Canada:—

"(a) to prepare a memorandum in duplicate of the sale;

"(b) to deliver the original of such memorandum of sale to the purchaser;

“(c) to retain the duplicate of such memorandum of sale on file in their office until such time as official permission is given for its destruction.”

“15. Affixing and Cancellation of Excise Tax Stamps by Stockbrokers, Banks, Trust Companies and Bond Dealers.

“That all stockbrokers, banks, trust companies, and bond dealers upon whom is imposed the duty of affixing excise tax stamps in accordance with the provisions of The Special War Revenue Act and the regulations thereunder established shall be and are hereby required:

“(a) to affix the said stamps securely to the proper documents, memoranda, books, etc.;

“(b) to cancel the said stamps by means of a perforator which shall perforate six holes of at least one-eighth of an inch in diameter through each stamp and the document to which same is affixed, or, in the alternative, the perforator may form the word ‘cancelled’ or the initials of the company, regardless of the dimensions of the perforations;

“(c) to provide an instrument for making such perforations.”

These regulations were subsequently rescinded with effect from 1st June 1937, by order of the Governor in Council, and the following regulations were substituted therefor:—

“2. Sales by Stock Brokers

“Every stock broker who effects the sale of any bond or share shall compute the tax payable and account therefor as follows:—

“(a) if the sale is effected upon a stock exchange pay the tax to the exchange and the exchange shall pay the Receiver General, as hereinafter provided, or

“(b) if the sale is effected otherwise than on a stock exchange, pay the tax forthwith by affixing excise stamps of the requisite value to a memorandum of the sale to be kept in his office.”

“9. Sales Records to be Kept by Banks, Bond Dealers, Stock Brokers and Trust Companies

“Every bank, bond dealer, stock broker or trust company which sells a bond or share, either as principal or agent, shall:—

“(a) prepare a memorandum in duplicate of the sale;

“(b) deliver one copy of such memorandum to the purchaser;

“(c) retain one copy on file until such time as official permission is given for its destruction.”

"12. Affixing and Cancellation of Stamps by Banks, Bond Dealers, Stock Brokers and Trust Companies

"Banks, bond dealers, stock brokers and trust companies charged with the duty of affixing excise tax stamps in accordance with these regulations shall,

"(a) affix the said stamps securely to the proper documents, memoranda, books, etc.;

"(b) cancel the said stamps by means of a perforator which shall perforate six holes of at least one-eighth of an inch in diameter through each stamp and the document to which the same is affixed, or in the alternative, the perforator may form the word 'cancelled' or the initials of the company's name, regardless of the dimensions of the perforations;

"(c) provide an instrument for making such perforations."

The general scheme of this legislation is to impose, levy and collect an excise tax upon every change of ownership consequent upon the sale, transfer or assignment of any bond or of any share. The tax is payable by the vendor, transferor or assignor of the bond or share. The computation of the amount of such tax in accordance with the table of taxation is to be made by the stockbroker. The tax is to be collected for and on behalf of the Crown by the stockbroker. The tax is to be payable in excise stamps, which are purchasable from stamp vendors duly authorized to sell excise stamps on behalf of the Crown. The stamps when so purchased by the vendor, transferor or assignor of the security are to be delivered to the stockbroker who has computed the amount of tax exigible and who by statute is charged with the collection of the tax for and on behalf of the Crown. The regulations then require that the stamps be affixed by the broker to a duplicate memorandum of the sale which is required to be prepared and kept by the broker, after he has delivered one copy of such memorandum to the purchaser. The copy, with the stamp or stamps affixed, is to be retained by the broker until such time as official permission is given by the proper Crown officer for its destruction. Such records are to be open for inspection by the Crown officers for audit. Thus it will be seen that a complete system is set up for payment, computation, collection, and accounting to the Crown of the tax collected, by preparation of records, affixing and cancellation of excise stamps and retention of such records for subsequent audit by the Crown auditors.

It is admitted in the proceedings that the defendants are stockbrokers within the requirements of the Act and that the defendants did, over the period in question, transact many sales of securities either directly as vendors or as the agents for vendor customers of the defendants. For the purpose of this action, it makes little or no difference by whom the tax was payable, as the action is based on the duty of the defendants to collect for and account to the Crown.

It is also clear on the evidence that transactions on which there was excise tax for the net amount claimed in the pleadings, after crediting an acknowledged payment of \$1,986.91, have been effected through the defendants' brokerage office. In some of these transactions the defendants were the actual vendors, but in the majority of instances they were acting on behalf of customers. The defendants maintained duplicate memoranda of sales.

It is claimed by the defendants, and I so accept on the evidence, that the defendants duly purchased stamps in the aggregate value of the amount now claimed, but it is clearly apparent on the evidence that the defendants did not comply with the regulations which required that the stamps be affixed to each particular duplicate memorandum of the individual sale and cancelled in the manner prescribed and in the time provided by the regulations. In fact, I can find no suggestion that stamps were affixed by the defendants to any document which approaches in description a duplicate of the memorandum of the sale as furnished to the purchaser, or even a cumulative duplicate of the memoranda of successive sales to various purchasers. Instead of so doing, it is given in evidence tendered on behalf of the defendants that the stamps in question were, from time to time and at varying intervals, oftentimes of considerable duration, purchased by the defendants with funds charged to the vendors of the securities, that such stamps were then affixed to an ordinary sheet of letter paper bearing the letterhead of the defendant partnership, with a notation that the stamps so affixed to the said sheet were for sales of unlisted securities during the certain period thereon named, and further that such stamps were then cancelled by a clerk drawing a pen through the same or initialling the same. From the evidence it appears that no data identifying the stamps so alleged to have been affixed to sheets of the defendants' letter paper with any particular sale or transfer

of a security were recorded on such sheets, other than the date of a day on, or period within, which the sale or sales were alleged to have been made.

Various employees of the defendants testified that a folder or file containing such sheets with stamps affixed had been maintained and that it had been seen by them from time to time in the office of the defendants until approximately a week before the visit of the auditors for the Crown, in the early part of July 1940. This file could not then be produced or accounted for and later, by a letter, Ex. 13, dated 29th July 1940, the defendants advised the Commissioner of Excise, as follows:

"Within the past several weeks the file, in which we carry Dominion Stock Transfer Tax Stamps purchased, has mysteriously disappeared. We have made a complete search of our premises and cannot locate the file.

"We feel now, justifiably, that they have been either maliciously removed, or taken with intent to re-sell."

At this point, it might be noted that the defendants in this letter referred, not to stamps collected, affixed and cancelled as one might expect in view of their duty under the statute and regulations, but to stamps "purchased". This fact, in conjunction with the defendants' expressed fear that the stamps "have been . . . taken with intent to re-sell", may be significant in evaluating the evidence of employees of the defendants as to the cancellation of all stamps.

The loss of this file was not, apparently, observed or brought to the attention of any partner in the defendant firm or any senior official thereof, until the Crown auditors first attended at the premises of the defendants in early July 1940, to effect a customary audit.

By registered letter (Ex. 5), dated 9th September 1941, the Commissioner of Excise, by virtue of the powers delegated to him by the Minister of National Revenue under s. 99(2) of the Act (*vide* Ex. 7) demanded that the defendants carry out the statutory duty imposed upon them by accounting for the tax collected by them for and on behalf of His Majesty in the total now sought to be recovered.

The defendants called witnesses and produced records of other brokerage firms in the city of Toronto, for the purpose, no doubt, of indicating that the Crown auditors had accepted cancellation of excise stamps in a manner other than that pre-

scribed by the regulations. Nevertheless it was inescapably noticeable that in such records of other brokerage firms, the stamps had invariably been attached to the actual duplicate memorandum of the sale. True it is that such duplicate memoranda in some instances had been kept in cumulative form on large binder sheets, and that the stamps had been affixed, not for each individual transaction, but at the conclusion of all transactions for a day or a week, as the case might be, on any particular binder sheet.

I have no difficulty whatsoever in finding that the defendants have utterly failed to comply with the regulations prescribing the mode of affixing excise stamps and retaining them until given permission for their destruction, so that a proper accounting could be given to the Crown of the tax thus collected by the defendants.

The plaintiff therefore asks, under the provision of s. 108 of the Act, for a judgment for the amount of such tax so collected by the defendant as a debt due to the Crown. In the alternative, the plaintiff has also asked for an order directing the defendants to affix excise stamps to the memoranda of sales in accordance with the statute and regulations, and to cancel them in compliance with the regulations. The plaintiff also asks for a declaration that the plaintiff is entitled to an order in the nature of a prerogative writ of *mandamus* directing the defendants to fulfil the duty imposed upon them as aforesaid, and further for damages in the amount claimed for breach of the duty imposed by statute and regulations for failure to perform or negligence in performing the duty imposed upon the defendants.

By way of defence, the defendants set up that the regulations hereinbefore referred to as having been enacted under and by virtue of s. 60 of the statute are *ultra vires* the terms of the said statute.

May I therefore examine the effect of s. 60. Let it first be noted that by the terms of s. 58(1) an excise tax is imposed, levied and collected upon every change of ownership of certain securities, at a rate of taxation therein prescribed. This tax is definitely and clearly payable by the vendor, transferor or assignor of such security as provided in s. 60, and is payable in a fixed type of currency, namely, in excise tax stamps.

As I understand the principles established by earlier decisions, the validity of an order in council is dependent on whether or not its provisions be repugnant to or beyond the reasonable contemplation and purview of the terms of the statute from which it emanates (*vide In re Price Brothers and Company and The Board of Commerce of Canada*, 60 S.C.R. 265, 54 D.L.R. 286, [1920] 2 W.W.R. 721). Nor am I unmindful of the principle that in case of any ambiguity in taxing legislation, the Courts resolve the same in favour of the subject. But the action at bar does not raise any question which could possibly impose a hardship upon or be detrimental to the subject from whom the tax is levied, *viz.*, the vendor of the security.

Giving to the language of this first clause of s. 60 its normal meaning, it can only imply that the vendor of the security is presumed to physically deliver to the person by whom the tax is collected for and on behalf of the Crown, excise stamps of the correct amount. There is no duty imposed by statute or regulation upon the stockbroker to "purchase" the stamps with reference to transactions passing through his hands as broker. No doubt as a service to his customers, the broker has assumed the task of purchasing the stamps as a matter of convenience for the broker's customers. In so purchasing the stamps from the authorized stamp vendor, the defendants were not performing any statutory duty placed upon them. They were acting solely as the agent for their customers. Therefore the evidence of purchase of excise stamps by the defendants is not necessarily probative of a fulfilment of the defendants' duty to collect.

The second clause of s. 60, gives to the Governor in Council the power to make regulations, prescribing the *manner in which* and *the persons by whom* the amount of tax when computed shall be collected for and on behalf of His Majesty.

Can it be said that the regulations hereinbefore recited in part, enacted by the Governor in Council by virtue of this statutory authority, exceeded in any manner or degree the scope of the statutory authority? It must not be overlooked that the authority given is to name the person by whom the tax shall be collected, and that the collection is for and on behalf of the Crown.

I fail to appreciate how it can be argued successfully that the regulations exceed such statutory terms in their provisions. The regulations impose the duty of collection upon the broker

and clearly indicate that the stamps which are payable by the vendor of the security are to be received by the broker at the time of the sale, and affixed by him to the *duplicate* memorandum of the sale, and are to be cancelled by the broker and retained by the broker in the manner and form aforesaid until inspected by the Crown auditors and until such times as official authority is given for their destruction. These regulations are, in my opinion, clearly as to "the manner in which the tax shall be collected", *i.e.*, the mode of dealing with the collection. Hence the regulations are within the scope of the language of s. 60.

There is no suggestion that any official authority for destruction of the cancelled stamps on the memoranda of sales was given in this instance.

While the defendants' counsel has argued that the word "collect" implies only a demand and obtaining of payment, yet it must not be overlooked that the statutory authority describes the collection as being for and on behalf of the Crown. Thus there is implied the trusteeship of the broker for the Crown, and there would be, at common law, the resulting implication that the broker must account for the moneys had and received on behalf of the Crown. His method of accounting therefor is in full contemplation in the terms of the regulations hereinbefore referred to. Thus I must conclude that since by the statute, s. 60, the duty is payable by the vendor of the security in excise stamps, it must be assumed that the stamps were purchased by the defendants as voluntary agents of the vendors and thus that the stamps originally came into possession of the defendants as agents of the vendors of the securities. This being so, can it be reasonably argued that the defendants have even collected the stamps for and on behalf of the Crown until the defendants have dealt with them *in the manner* prescribed by the regulations in question?

Moreover it should not be overlooked that even though it might successfully be contended that the power conferred by s. 60 on the Governor in Council is only to make regulations to compute and collect the tax, yet there is a statutory duty imposed by the statute itself (s. 62) which imposes a liability on the defendants, as persons liable to collect the tax, to keep records and books of account adequate for the purposes of Part VII of the Act. Hence, aside from the regulations established by the Governor in Council, there is to be found within the

terms of the statute itself (s. 62) the undoubted implication of a duty to account by the collector.

I must find that the defendants have failed in their statutory duty to collect for and on behalf of the Crown and account therefor, and therefore that the plaintiff is entitled to recover, under the terms of s. 108 of the Act, the *sums payable* under the Act as and from the time the same *ought to have been accounted for* by the defendants.

In resisting liability counsel for the defendants cited the case of *The King v. Crabbs*, [1934] S.C.R. 523, [1934] 4 D.L.R. 324, but I fail to see how this decision has any bearing upon the facts of this case. In the *Crabbs* case, it was sought to fix liability on a broker who had effected a sale of a security as agent, and had failed to affix the revenue stamp to the security in question. It was there sought to attach to the broker an obligation for payment of the tax. In the action at law, there is no suggestion that the tax should be paid in the first instance by the broker. The present defendants are only called upon to account for revenue collected for and on behalf of the Crown, and failure to account for collection in the manner prescribed, in my opinion, renders the defendants liable for the amount in question. If, on a proper construction of the statute, the defendant in a proceeding by the Crown is liable, as I consider these defendants are, the Court has nothing to do with the hardship of the case. *The King v. Robitaille et al.* (1909), 12 Ex. C.R. 264.

The defendants further set up by way of defence to the claim for an accounting in the terms of the regulations, that the action of the Crown officials has estopped the Crown from insisting upon a strict compliance with the regulations. Although it was rather nebulous as to time and place and identity of persons, it was given in evidence on behalf of the defendants that some years prior to 1940 auditors on behalf of the plaintiff had called at the defendants' office in Toronto, and had been acquainted with the method of affixing, cancelling and retaining tax stamps only in a file of letter stationery as hereinbefore described and that the auditors had taken no objection to such irregular procedure. The defendants therefore now plead the waiver by the plaintiff, through its agent, of the necessity for strict compliance with the regulations.

Records from other brokerage houses were submitted in evidence in support of the contention that the Crown agents

had as a matter of custom waived strict compliance with the regulations as to the method of cancelling tax stamps. However such records of other brokers indicated an effort on behalf of such other brokers to follow the regulations with respect to affixing tax stamps to the required records, even if there had been an acceptance of methods of cancellation of stamps which effect, however, was not strictly in compliance with regulations.

Counsel for the defendants relied upon *The King v. The Canadian Pacific Railway Company*, [1930] Ex. C.R. 26, [1929] 2 D.L.R. 641, 35 C.R.C. 248, in support of this contention as to estoppel. The only effect of this decision is that while the Court affirmed the well-established doctrine that estoppel does not apply against the Crown, it was held that in a proper case the Crown may be held liable for acts or conduct of its responsible officers, which if occurring between subject and subject would amount to an estoppel *in pais*. But the conduct under review in that case involved the physical erection and maintenance of telegraph poles by the railway company on certain lands over a period of some forty years. I cannot hold that the facts there present and in the present case can be even suggested to be comparable.

The facts on which the defendants rely herein to support an estoppel are very similar to those in *Rex v. Disappearing Propeller Boat Co. Ltd.* (1924), 55 O.L.R. 545, where Logie J. held that statements alleged to have been made by a Crown departmental official, even though admitted, could not bind the Crown.

It is well established that the defence of estoppel cannot be invoked against the Crown, nor can the acts of the Crown's servants or agents bind it by estoppel. The interests of the Crown are certain and permanent and they must not suffer by the misconduct or negligence of its servants, *vide The Capital Brewing Company, Limited v. The King*, [1933] S.C.R. 226, [1933] 2 D.L.R. 141; *The Queen v. The Bank of Nova Scotia et al.* (1885), 11 S.C.R. 1; *The Bank of Montreal v. The King et al.* (1907), 38 S.C.R. 258, affirming 11 O.L.R. 595, and *Western Vinegars Limited v. The Minister of National Revenue*, [1938] Ex. C.R. 39, [1938] 2 D.L.R. 503. The defendants must therefore fail on this defence.

So far as the further defence as to at least part of the claim is concerned, *viz.*, that such claim is barred by the Statute of

Limitations—again the defendants must fail. By virtue of s. 108 of The Special War Revenue Act the present action is for a debt due under a statute and it is therefore of the nature of a specialty debt in which event the period of limitation is twenty years. Reference to *Carlyle v. County of Oxford* (1914), 30 O.L.R. 413, 18 D.L.R. 759; *Meagher v. London Loan and Savings Co. of Canada*, 64 O.L.R. 221, [1929] 4 D.L.R. 565.

The defendants further contended that assuming for the moment that they had failed in their duty to affix, cancel and retain the collected stamps as required by statute and the regulations thereunder, it has been demonstrated conclusively that stamps of the necessary aggregate claimed were in fact purchased from the Crown's authorized stamp vendor and hence there was no loss of revenue sustained by the Crown. But this seems to me to be aside from the point and certainly not the only rational conclusion. In fact in the defendants' letter (Ex. 13) the defendants themselves offer an explanation which would undoubtedly be a matter of loss to the Crown, *viz.*, the re-sale of the stamps in question. Excise stamps which are uncanceled and unaccounted for are obviously negotiable. To argue that proof of the purchase of excise stamps of an amount leviable on any one transaction or series of transactions is probative of the payment or collection of the tax exigible with respect to such transaction or transactions seems to me to be wholly untenable. To acquiesce in such an argument strikes one as being as reasonable as to claim that a man has paid his income tax by purchasing Dominion of Canada Victory Bonds for the appropriate amount and then, without delivering the bonds to the Collector of Income Tax for cancellation in satisfaction of his debt to the Crown, to set up a contention that his income tax was paid because the Crown had received the money which he had appropriated for such payment.

Again the defendants plead that by reason of the fact that The Special War Revenue Act provides a penalty for failure to comply with s. 62 thereof, the Crown is precluded from taking the present action. As I appreciate the rule of law in that respect, it has been clearly held that the imposition of specific penalties or the provision of specific remedies by a statute for a breach thereof does not abrogate any common law remedy theretofore open to a claimant. Quite apart from the right of action contained in s. 108, in my opinion the plaintiff is clearly

entitled to the common law right of action against the defendants as trustees of moneys or the equivalent of moneys had and received for and on behalf of the Crown. As is said by Logie J. in *Rex v. Disappearing Propeller Boat Co. Ltd.* (1924), 55 O.L.R. at p. 546, "The scheme of this legislation [re sales tax] was to make the vendor the agent of the Government to collect this tax . . . It is admitted that under this head the defendants collected from customers the sum of . . . They are trustees of this amount for the plaintiff and must pay it over to the Government."

However, in any event, I believe it is abundantly clear that the Crown has the right to recover the claim herein as a debt due under s. 108(1) quite independently of the recovery of penalties under s. 108(2)—*vide The King v. Noxzema Chemical Company of Canada, Limited*, [1942] S.C.R. 178, [1942] 2 D.L.R. 51.

That being so, I can see no necessity for considering the plaintiff's claim for a mandatory order or for the issue of the prerogative writ of *mandamus*. But if the alternative remedy is deemed advisable, counsel may again attend and speak to the same.

There shall be judgment for the plaintiff for the sum claimed with the costs of this action.

Judgment for the plaintiff with costs.

Solicitors for the plaintiff: McRuer, Mason, Cameron & Brewin, Toronto.

Solicitors for the defendants: Lawson & Stratton, Toronto.

[MACKAY J.]

Terminal Warehouse, Limited v. The King.

Highways—Duty to Repair—Extent and Limits of Duty—What Constitutes Non-repair—Knowledge and Inaction—The Highway Improvement Act, R.S.O. 1937, c. 56, s. 75(1), (2), (4).

The Provincial Department of Highways has not, under The Highway Improvement Act, R.S.O. 1937, c. 56, an absolute duty to prevent accidents on the highway owing to roughness, unevenness or broken pavement; it has a duty to see that the highway is kept in such a reasonable state of repair that those requiring to use it may, using ordinary care, pass to and fro over it in safety. *McCready v. County of Brant*, [1939] S.C.R. 278, [1939] 3 D.L.R. 358, applied. Before a condition can constitute non-repair in law, there must be knowledge of the condition on the part of those responsible (or such a lapse of time that knowledge can be imputed to them), together with inaction.

The duty to keep in repair exists even while work is in progress. *Weston v. County of Middlesex* (1914), 31 O.L.R. 148 at 150, 19 D.L.R. 646, applied. The duty of the Department when making repairs upon a travelled road is to take such care by notice, lighting, etc., as may be reasonably necessary for the protection of the public during the period of the repairs, but there is also a duty on those using the highway to use ordinary care, and, especially in the spring of the year, to be on the look-out for warning signs.

AN action for damages based upon alleged non-repair of a highway. The facts are fully stated in the judgment.

9th to 13th November 1942. The action was tried by MACKAY J. without a jury at London.

P. E. F. Smily, K.C., for the plaintiff.

D. J. Coffey, K.C., for the defendant.

15th January 1943. MACKAY J.:—The plaintiff is a corporation carrying on the business of motor transport throughout the Province of Ontario under the name of Direct-Winters Transport.

At or about 12.15 on the morning of 28th May 1942, one John Glassford, an employee of the plaintiff corporation, was driving a 1941 Ford tractor with loaded semi-trailer, owned by the plaintiff corporation, in an easterly direction on Highway no. 2. When at a point near the village of Strathburn, in the county of Middlesex, the said motor vehicle and tractor, then being driven at from twenty-five to thirty miles per hour, entered a broken and bumpy portion of the said Highway no. 2, at or near the crest of a hill, and, the driver having lost control, the vehicle crossed the highway and the shoulder of the road to the north, came in contact with a telephone pole, and finally fell over on its side. The tractor and trailer sustained damage to

the amount of about \$712.43. Fortunately no personal injuries were sustained by Glassford, the driver of the car, who was at the time alone in the vehicle.

The plaintiff says the said highway was then out of repair and demands damages and costs.

The Highway Improvement Act, R.S.O. 1937, c. 56, by s. 75, subss. 1, 2 and 4, provides in part as follows:

“(1) Every portion of the King’s Highway shall be maintained and kept in repair by the Department . . .

“(2) In case of default by the Department to keep any portion of the King’s Highway in repair, the Department shall be liable for all damages sustained by any person by reason of such default . . .

“(4) No action shall be brought for the recovery of the damages mentioned in subsection 2, unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered post to the Department, within ten days after the happening of the injury.”

The defendants admit that a proper and sufficient notice was received by them within such ten-day period.

Briefly, the facts are as follows: At a point on the crest of a hill a quarter of a mile east of the village of Strathburn, there is an area extending east and west for some hundreds of yards, of which the sub-soil or sub-grade is a heavy silty clay, having a characteristic of drawing water for a substantial distance. As a result of frost, this capillary action superinduces heaving, especially in the spring of the year. The cement pavement in this area was laid in 1925, and was approximately seven inches in thickness.

On or about 14th March 1942, one Duncan McEachren, a road foreman having jurisdiction over this part of the highway, noticed some indication of breaking or crumbling of the pavement at or near the spot where the accident occurred, and by 15th April it had shown such deterioration that he and his men drew bituminous material and crushed stone from a nearby village—Lambeth—and repaired in a temporary way the break in the pavement. By this time, 15th April, there were large pieces of concrete pavement broken off and turned on edge. The condition of the highway at this point was so bad that McEachren left a workman at the spot to warn the public of

its condition while the repair material was being drawn from Lambeth.

On 16th April the broken pavement was dug up and three or more loads of bituminous material and crushed stone were deposited in the broken place as a foundation. On 17th April about four tons of bituminous material and crushed stone completed the temporary repairs, which for the time being left the road as smooth as the pavement immediately to the east and west.

In the course of a week, or about 24th April, because of the unstable and springy foundation, the bituminous material and stone deposit started breaking up and coming out, whereupon the foreman decided that further repairs of bituminous material and crushed stone were inadvisable, and instead filled the breaks in the highway with clay and pit gravel. This work was done from time to time as the situation warranted, and levelled off night and morning. The break in the road started about one foot north of the south side of the pavement, and extended for ten or twelve feet north. This pavement is twenty feet wide. The break was about seven feet from east to west.

[The judgment here quotes McEachren's evidence as to the work done at or about this time, to the effect that patches were put on the road night and morning daily, leaving the road each time as level as the unbroken part, and that, because of the spongy condition of the sub-soil, water would stand in the ditch at the side of the road, and that on 16th May the ditch was enlarged with a team and scraper.]

There is a sharp conflict in the evidence as to the depth of the hole at the time of the accident, estimates varying from three to ten inches. [The judgment then quotes the evidence of Gordon Howell, civil engineer of the Department of Highways, who was in charge, for the Department, when permanent repairs were undertaken by a contractor, on 29th May 1942, and proceeds:]

I find that at no place was the break in the highway of greater depth than six inches.

I am of opinion that two preliminary questions fall to be determined by the Court:

First: Was the method and procedure of temporary repair correct and proper, having regard to all the circumstances?

The evidence of William Alder, Divisional Engineer in the employ of the Department of Highways, who has been connected with the Department for twenty-three years (eighteen years as Divisional Engineer), is as follows:

"MR. COFFEY: Q. You are, of course, familiar with the making of repairs in the springtime when roads break up; that has been your job for some time? A. Yes.

"Q. What do you say with regard to putting in permanent repairs in the spring up to a certain time; what do you say as to making a permanent repair at various times? A. We consider that it would be inadvisable to put in a permanent repair as long as your sub-soil which is a foundation is unstable.

"Q. What do you mean by unstable? A. That is, it won't take the weight called upon to carry and would move, or push.

"HIS LORDSHIP: Q. This is very important. Because of what, because of being water-logged? A. Yes. Clay when it takes water will move or go from underneath a weight when it is wet; wet clay will only take a weight of probably half a ton to one ton when it is wet per square foot, weight put down on wet clay. Dry that clay out and it will take from six to ten ton.

"Q. And if the concrete is laid when the clay is dry you get a better job for the time being. If it is a rainy season, will the clay re-absorb water again? A. Yes.

"Q. And cause the same unfortunate condition? A. It is liable to, yes.

"Q. That is a condition you cannot overcome, is it? A. No.

"Q. So then we have the unfortunate situation that although you waited until the clay, the sub-grade was sufficiently dry, if within a week or so after the concrete was poured we had a week of rain, it would be back in practically the same condition as it would be if the concrete were poured on wet clay? A. Yes.

"Q. Is there no way to overcome that? A. The way we overcome it is to take out the clay for a certain depth and if any gravel and sand and that as is pervious to water—that is, the water will shed out to the side and increase the bearing power underneath your pavement.

"Q. Is that what was done here? A. In this case we had the contractor dig down for a depth between three and four feet at the side of the pavement and put in tile both up and down—put in 2,000 feet on both sides of the road, back-fill the six-inch tile with gravel and sand, and then besides at this spot we put

in fifteen inches or a foot at least of gravel underneath what was to be our new pavement and carried our gravel out to the gravel over to the tile so that in future years the water that comes from the water level from the higher bank comes across the gravel there, comes down to the gravel, and out the tile and away it goes.

"MR. COFFEY: Q. That was done. What do you say as to making permanent repairs such as you have spoken of, we will say earlier in the spring, earlier than it was done in this case?

"HIS LORDSHIP: Earlier than the 28th of May?

"MR. COFFEY: Q. I presume the date differs all over as to conditions? A. Yes, it varies according to the amount of moisture in the soil from the water conditions and the frost.

"Q. You might be able to repair some places two or three weeks ahead of other places? A. Yes.

"Q. Because of the sub-soil and conditions? A. Yes.

"Q. And, further, it depends on the season of the year? A. Yes.

"Q. Is that right? A. Yes.

"HIS LORDSHIP: Q. If it were sand soil you would have no difficulty there with the sub-grade being water-logged, would you?

"MR. COFFEY: It depends on conditions, and the season, and the location and many things.

"HIS LORDSHIP: Let us take that one area, Mr. Coffey, we will have to come to it sooner or later.

"MR. COFFEY: Yes, I thought I would generally. Q. Now, coming to this particular area, you have heard all this being described by Mr. McEachren and Mr. Howell and others. When would you as an engineer say it would be safe and reasonable to put it in at this spot—at what time of this year; what date would it be safe? A. About the end of May it was drying out enough to give it more stability that would hold the pavement that you would put on and not allow it to freshly crack again and be destroyed.

"Q. You saw the condition there, apparently. Supposing you had put in a permanent repair we will say some time in April or May, or something of that kind, how long might that stay there? A. If you built it with bituminous material it might not last a day or so; it depends on your heavy loads that go over it.

"HIS LORDSHIP: Q. Can you suggest any other material—I mean, always speaking with a viewpoint of practicability—which might be placed in that depression which would have served the purpose better than this bituminous material? A. During the repairs?

"Q. Yes, during the period from the 1st of April to the last of May—from the middle of April to the last of May, I think is better. A. I don't think so; it was our usual material to use.

"Q. That is the usual material used? A. For repairing such conditions.

"MR. COFFEY: Q. Did you see what happened to this patch that was put in there on the 28th of May? What happened to that? A. When I was there the 28th of May I could only see that the gravel over this spot—the foreman had been there an hour or two previously and it was just fresh gravel.

"Q. Could you see the black patch that had been put in? A. No, it was covered up with gravel.

"Q. Mr. McEachren, in speaking about this patch, said he had tried this out. What do you say about his procedure in putting in clay and gravel up to the time the contractor took over? A. I consider it was good practice.

"Q. Now, you had this piece of road under consideration prior to the 28th of May? A. I did.

"Q. And what as division engineer did you do about it? A. Noticing about the middle of the month that the spot was so slow in drying out or becoming stable and springy, that under such condition we would only have repeated conditions in coming years, I decided that the best thing to do was to make more extensive reconstruction of the hill by thoroughly draining with tile up and down and digging out your wet sub-grade and replacing it with gravel and topping it with a thicker layer of bituminous material, that we wouldn't think of doing in ordinary repair work with patrolling.

"Q. What length of road would come under that recommendation? A. We did this whole hill with drainage, and the bad spots, this bad spot and others which we thought might require doing in another year, we also repaired that permanently; and besides we covered this whole hill, which was sixteen hundred feet long, we then continued it further to the west of the junction of highway 80 and no. 2—a total distance of about half a mile.

“Q. Why did you include more road than the hill? A. Because the other section of the road was showing, starting to show, a disintegration of the concrete from the length of time it had been down there; and considering that by adding this length we could have the contractor do the whole thing and probably give us a reduced price on his work, by giving a larger quantity of work.”

In view of this evidence, I cannot see that it can be successfully contended that the method, means and procedure of repair are not in accordance with good engineering practice.

Question No. 2: Was the warning given for the protection of the travelling public, respecting the condition of the road at the point in question, sufficient and proper?

Five hundred feet west of the broken pavement there was a sign bearing the word “BUMP”. This sign is approximately 18½ inches by 30 inches. The background of the sign is white. At the bottom and the top are four black squares and three white squares in the form of a checker-board. The size of the squares is 3 by 3½ inches. The letters are red and are 7 inches high and about 1½ inches apart. The post of this sign was erected 7 feet south from the southerly edge of the pavement and about 4 feet high. This sign was in that position for some weeks prior to May 28th.

There was also a “BUMP” sign on the south side of the highway 350 feet west of the broken pavement, placed on a trestle frame-work with ground supports reinforced with 2x4’s in the form of a V. This sign was a little over 2 feet high and was erected some two or three weeks before the accident. There was further a “CAUTION” sign on the south side of the highway about 150 feet west of the broken pavement, which had been there for two or three weeks before the accident. The letters “C-A-U-T-I-O-N” were black, and the background was white, the letters being about 7 inches in height and 1½ inches apart. There is a conflict of evidence touching the time that these signs were put up, but I find that they were so placed before 28th May.

I am bound to conclude that these warning signs were sufficient to advise a careful driver of hazardous conditions on the highway.

The driver Glassford had not been over this road for six months before the accident, and did not know the condition of the highway at this point. Moreover, there were areas of fog

on the night of the 27th-28th, mostly confined to valleys or swales. The conditions were such that driving was made difficult. Glassford did not see the break in the highway until he was 25 or 30 feet away from the broken highway, and failed to notice the three warning signs south of the concrete and west of the highway.

The duty to keep in repair exists even while work is in progress: *Weston v. County of Middlesex* (1914), 31 O.L.R. 148 at 150, 19 D.L.R. 646. The duty of the Department when making repairs upon a travelled road is to take such care, by notice, lighting, etc., as may be reasonably necessary for the protection of the public during the period of such temporary repairs, but there is also a duty on those using the highway to use ordinary care, and, especially in the spring of the year, to be on the look-out for "bump" and "caution" signs. If the user of a highway fails to exercise such reasonable care on his part, then his claim for damages must fail.

I am of opinion that the effective cause of the accident was the failure of the driver of the car, Glassford, to keep a proper look-out, and his consequent failure to see the warning signs.

I cannot avoid the conclusion from the evidence, which was not seriously challenged, that the warnings placed by the Department of Highways west of the broken portion of the pavement were adequate, and, having regard to the diffusion of light from the vehicle driven by Glassford (the lower beam being used), the lights could not have failed to make the warning signs discernible without difficulty.

There was heavy traffic over the road on the night of 27th-28th May, and it may very well be that some difficulty had been experienced by some drivers, but having regard to the time of the year, the condition and characteristics of climatic change, as well as peculiarities of sub-strata, likely to be given to heaving, is it too much to expect that users of the highway should be on the alert for such rough and broken portions of the highway?

Before a condition constitutes non-repair in law, there must be *knowledge* of the condition of the highway (or such a lapse of time that knowledge should be imputed) and *inaction* by the Department. In the case at bar there was *knowledge* and reasonably efficient *action*.

I find from the evidence that until the frost comes out of the ground and the sub-grade becomes sufficiently firm and dry, permanent repair is not feasible.

In April, bituminous material and crushed stone was used, which failed to remain in place for any substantial time because of an insecure foundation. It is clear from the evidence that in such circumstances all that can be done is to keep the broken pavement filled with some material such as gravel and clay in the hope that the clay will, to a certain extent, bind the gravel. The temporary repair must, of course, be kept under constant supervision. I find on the evidence that the roughness caused by wheels of vehicles in the gravel and clay was levelled night and morning under supervision by the road foreman.

Briefly to re-state: The law is not that the Highway Department has an absolute duty to prevent, in any circumstances, accidents on the highway owing to roughness, unevenness or broken pavement. The Department has a duty to see that the highway is kept in such a reasonable state of repair that those requiring to use it may, using ordinary care, pass to and fro over it in safety, in other words, to keep its highways in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety. *McCready v. County of Brant*, [1939] S.C.R. 278, [1939] 3 D.L.R. 358.

In case this judgment comes under review, I assess the plaintiff's damages as set forth in its itemized statement (Ex. 2) and attached letter, at \$712.43.

The action should be dismissed with costs.

The following authorities have been reviewed: *Williams v. Town of North Battleford* (1911), 16 W.L.R. 301; *Castor v. Township of Uxbridge* (1876), 39 U.C.Q.B. 113; *Foley et al. v. Township of East Flamborough* (1898), 29 O.R. 139, reversed 26 O.A.R. 43; *City of Vancouver v. Cummings* (1912), 46 S.C.R. 457, 2 W.W.R. 66, 22 W.L.R. 164, 2 D.L.R. 253; *Sandlos v. Township of Brant* (1921), 49 O.L.R. 142, 58 D.L.R. 673; *Trueman v. The King*; *Dewan v. The King*, [1932] O.R. 703, [1932] 4 D.L.R. 676; and *Wise v. Toronto Transportation Commission*, 62 O.L.R. 120, 34 C.R.C. 256, [1928] 2 D.L.R. 557.

Action dismissed with costs.

Solicitors for the plaintiff: Smily, Shaver, Adams, DeRoche & Fraser, Toronto.

Solicitors for the defendant: Coffey & McDermott, Toronto.

[PLAXTON J.]

The Commodore Grill v. The Town of Dunnville.

Municipal Corporations—Validity of By-laws—Licensing and Regulating Power—Complex but Indivisible Power—Necessity for Complete Exercise—The Municipal Acts, R.S.O. 1914, c. 192, ss. 253, 417(4), (5); 1937, c. 266, ss. 271, 414(4).

The power of a municipal corporation, under what is now s. 414(4) of The Municipal Act, R.S.O. 1937, c. 266, to provide by by-law "for limiting the number of and licensing and regulating victualling houses", etc., is a single power. Although it is complex in its elements, it is indivisible, and must therefore be exercised either as a whole or not at all. *Re Rex v. Cullian*, [1937] O.R. 922, [1937] 4 D.L.R. 670, applied. A by-law, therefore, which merely requires a licence as a condition of operating, and fixes the fee to be paid for such licence, without either limiting the numbers or regulating the conduct of such establishments, is invalid.

It is a settled principle that where by-laws are directed against the common law right of every subject to employ himself in any lawful trade or calling he pleases, the municipality enacting such a by-law must be confined strictly within the limits of its authority, and that all attempts to exceed that authority should be firmly repelled by the courts. *Merritt v. City of Toronto* (1895), 22 O.A.R. 205 at 207; *Watt v. Drysdale* (1907), 17 Man. R. 15; *Re Stronach* (1928), 61 O.L.R. 636 at 641, applied.

AN action for a declaration, and for other relief, fully stated in the judgment.

27th and 28th April 1942. The action was tried by PLAXTON J. without a jury at St. Catharines.

R. M. Willes Chitty, K.C., and *Charles F. Adams*, for the plaintiffs.

Fraser Raney, K.C., for the defendant.

20th January 1943. PLAXTON J.:—The issue raised for decision in this action is in substance whether or not the plaintiffs (a partnership consisting of two members, Theo. Christakos and Heleni Poulos) are entitled to require the defendant municipality to issue to them, under by-law no. 11 of 1915, of the defendant municipality, a licence to operate a restaurant and ice-cream parlour at 174 Queen Street, in the town of Dunnville, or, alternatively, whether or not the said by-law is a valid exercise of the powers delegated to the municipality under the provisions of The Municipal Act, R.S.O. 1914, c. 192. The partnership was formed by agreement between the plaintiffs, dated 11th January 1941 (Ex. 2). Lease, dated 8th January 1941 (also part of Ex. 2) is a lease by Hattie Bicknell to the plaintiffs of the premises in question, for a term of ten years from 1st March 1941, at a rental of \$100 per month, renewable for a further term of 10 years.

Petition dated 16th April 1941 (Ex. 1) is an application by the plaintiffs, with a covering letter, to the council of the defendant municipality, for a licence to conduct a restaurant and sell tobacco. The petition was accompanied by the documents included in Ex. 2, and by a certified cheque in favour of the defendant municipality for the sum of \$20 in payment of the prescribed licence fee. Subsequently, having received no answer to their application for a licence, the plaintiffs opened the restaurant for business, and by letter of their solicitor dated 26th April 1941 (Ex. 4-C), forwarded to the treasurer of the defendant municipality a cheque for the sum of \$10 in its favour, to cover payment for the tobacco-vending licence. By letter dated 28th April 1941 (Ex. 4-D), the town clerk advised the solicitor for the plaintiffs that Mrs. Heleni Poulos had made application for a restaurant licence on 7th February 1941, which it was presumed was intended by her to apply to the location referred to in the plaintiffs' petition of 16th April 1941; that this application had been considered by the council of the town of Dunnville, and that Mrs. Poulos had been notified by registered letter dated 31st March 1941, that her application had been refused. This letter further directed attention to the fact that the town of Dunnville had a restaurant by-law which forbade the opening up or carrying on of a restaurant without a licence, and informed the plaintiffs' solicitor that his clients, therefore, had no authority to open up this business until they had obtained a licence, and, accordingly, returned the plaintiffs' cheques in favour of the town of Dunnville for the sums of \$20 and \$10 respectively. By letter of 30th April 1941 (Ex. 4-E) the solicitor for the plaintiffs returned these cheques to the town clerk on the assumption that they had not yet served the purpose for which they had been submitted. By letter dated 2nd May 1941 (Ex. 4-G) the town clerk advised the solicitor for the plaintiffs that the municipal council of the Town had passed the following resolution on that date:—

“That no Licence to operate a Restaurant be granted to Theo. Christakos or Heleni Poulos or the Commodore Grill, and that the Clerk is hereby instructed to notify the above-mentioned Applicants to this effect.” He accordingly returned to them the two cheques above mentioned.

On the strength presumably of the evidence afforded by these documents, the plaintiffs, in their statement of claim, allege

that they have fully observed, carried out and performed all matters and things necessary under by-law no. 11 of 1915 of the defendant municipality, to entitle them to the licence applied for; that the defendant has refused, and still refuses, to grant them the said licence, and that they have, consequently, been prejudiced, hampered and interfered with in the opening and carrying on of the said restaurant.

For the defence, evidence was given by Edward D. Kelly, a member of the council of the defendant municipality and chairman of the licence committee for the year 1941, by William James Griffith, mayor of the defendant municipality throughout the same year, by James M. Allan and James G. Campbellford, reeve and deputy reeve of the defendant municipality in the year 1941, and also by James M. Phillips, chief of police of the defendant municipality, to the effect that the latter had, at the instance of the chairman of the licence committee, made certain inquiries concerning the plaintiffs, and made a report to the licence committee, that on the strength of this report the licence committee had recommended that the licence applied for be not granted, and that on this report the council had unanimously passed the resolution set out in Ex. 4-G.

By-law no. 11 of 1915 (Ex. 3) is entitled "A By-law to provide for the price to be paid for licenses." It provides for the licensing of, and prescribes the licence fees payable by, persons engaged in some seven different trades or occupations, namely, keepers of victualling houses, plumbers and gas-fitters and electricians, laundrymen, cigarette vendors and keepers of weigh scales; and, in addition, provides for the payment of certain prescribed fees for each circus or menagerie, merry-go-round, switch-back railway, carousal, wax-works, medicine vendors or small shows, shown or operated or exhibited or doing business within the limits of the municipality. The only provisions of the by-law pertinent to the issue raised in this action are paras. 1, 2 and 3, which read as follows:—

"1. That the charges hereinafter set out shall be levied and collected from all persons obtaining licenses for the several trades, businesses or objects hereinafter mentioned.

"2. Every person who owns or keeps a victualling house, ordinary, or house where fruit, fish, oysters, clams or victuals are sold to be eaten therein must pay an annual fee of twenty dollars to the Treasurer of the Municipality of the Town of

Dunnville, on or before the 15th day of May in each year. This shall not be held to apply to Confectioners selling ice cream.

"3. No person or persons shall be allowed to open up or carry on a victualling house as defined in the previous paragraph in the said Town, without first obtaining a proper license from the Council."

These provisions of the by-law were enacted by the municipal council of the defendant municipality in exercise presumably of the powers conferred by s. 417(4) and (5) and s. 253 of The Municipal Act, R.S.O. 1914, c. 192; these were, indeed, the only sections relied on by counsel for the defendant in support of the validity of the said provisions of the by-law and of the action of the municipal council of the defendant in refusing to grant a licence to the plaintiffs. S. 417(4) and (5) [see now s. 414(4) of R.S.O. 1937, c. 266] provide:

"By-laws may be passed by the councils of . . . towns. . . .

"4. For limiting the number of and licensing and regulating victualling houses, ordinaries and houses where fruit, fish, oysters, clams or victuals are sold to be eaten therein, and places not being a tavern or shop licensed under The Liquor License Act, for the lodging, reception, refreshment or entertainment of the public.

"5. For revoking the licence.

"(a) The sum to be paid for the license shall not exceed \$20."

S. 253(1), (2), (3) and (4) [now s. 271] provide as follows:—

"(1) The power to license any trade, calling, business or occupation or the person carrying on or engaged in it shall include the power to prohibit the carrying on of or the engaging in it without a license.

"(2) Except where the power of fixing the sum to be paid for the license is expressly conferred on a Board of Commissioners of Police, the Council of the Municipality, where by this or any other Act the Council or the Board is authorized to pass by-laws for licensing any trade, calling, business or occupation or the person carrying on or engaged in it, may, subject to the limitations contained in the Act, fix the sum to be paid for the license and the time for which it shall be in force and may provide for enforcing payment of the license fee.

"(3) The license fee may be in the nature of a tax for the privilege conferred by it.

“(4) The granting or refusing of a license to any person to carry on a particular trade, calling, business or occupation, or of revoking a license under any of the powers conferred upon a council or a Board of Commissioners of Police by this Act, or any other Act, shall be in its discretion, and it shall not be bound to give any reason for refusing or revoking a license and its action shall not be open to question or review by any Court.”

The provisions of s. 253 were enacted by the Legislature to overcome and displace the effect of the decision of the Court of Appeal in *Merritt v. City of Toronto* (1895), 22 O.A.R. 205, where it was held that the power of a municipality to pass by-laws “for licensing, regulating, and governing” auctioneers and other persons did not include the power to prohibit, and that a municipal corporation could not, as the law then stood, refuse to grant an auctioneer’s licence on the ground of the applicant’s bad character.

Subs. 1 of s. 253 is in supplement of the powers conferred upon the municipality by s. 417(4) and (5). I do not doubt that it affords authority for the prohibition set forth in para. 3 of the by-law in question, if the by-law, so far as it deals with victualling houses, be in other respects, *debors* s. 253, a valid exercise of the powers conferred on the defendant municipality by s. 417(4) and (5). It is a settled principle that where by-laws are directed against the common law right, and the liberty and freedom, of every subject to employ himself in any lawful trade or calling he pleases, municipal corporations, in the exercise of the statutory powers conferred upon them to make by-laws, should be confined strictly within the limits of their authority, and that all attempts on their part to exceed it should be firmly repelled by the courts; *Merritt v. City of Toronto*, *supra*, at 207; *Watt v. Drysdale* (1907), 17 Man. R. 15, 6 W.L.R. 234; *Re Stronach*, 61 O.L.R. 636 at 641, [1928] 3 D.L.R. 216, 49 C.C.C. 336 (*sub nom. Rex v. Stronach*); see also *Re By-law 3481 of the City of St. Thomas*; *Cassis v. City of St. Thomas*, [1942] O.W.N. 643 at 644.

Admittedly by-law no. 11 of 1915 does not limit the number of victualling houses, etc., nor does it profess to regulate the persons licensed to keep such houses. Neither does it profess to limit the number of, or provide for licensing and regulating, places not being taverns or shops licensed under The Liquor License Act for the lodging, refreshment or entertainment of

the public. There can be no doubt that the power conferred upon the defendant municipality by s. 417(4) to do these things has not been exercised, and Mr. Chitty impugned the validity of the by-law substantially upon the grounds I have just mentioned.

These objections to the by-law amount to this, that the words, "for limiting the number of and licensing and regulating", must be read and construed conjunctively, and that it is not a valid exercise of the power conferred for the municipality to provide simply for licensing victualling houses, etc., without also limiting the number of such houses, etc., and regulating them.

The word "and" in the phrase for "limiting the number of and licensing and regulating" is conjunctive or copulative.

This does not appear to be a case in which one would be justified in construing the word "and" as "or". "Ordinarily the words 'and' and 'or', are in no sense interchangeable terms, but, on the contrary, are used in the structure of language for purposes entirely variant, the former being strictly of a conjunctive, the latter of a disjunctive, nature. Nevertheless, in order to effectuate the intention of the parties to an instrument, a testator, or a legislature, as the case may be, the word 'and' is sometimes construed to mean 'or'. This construction, however, is never resorted to except for strong reasons and the words should never be so construed unless the context favors the conversion; as where it must be done in order to effectuate the manifest intention of the user; and where not to do so would render the meaning ambiguous, or result in an absurdity; or would be tantamount to a refusal to correct a mistake." 3 Corpus Juris Secundum 1068.

In *Morgan v. Thomas* (1882), 9 Q.B.D. 643 at 645, Jessel M.R. said: "You will find it said in some cases that 'or' means 'and'; but 'or' never does mean 'and'; unless there is a context which shews it is used for 'and' by mistake"; and in *The Mersey Docks and Harbour Board v. Henderson Brothers* (1888), 13 App. Cas. 595 at 603, Lord Halsbury L.C. said: "I know no authority for such a proceeding [turning 'or' into 'and' or conversely] unless the context makes the necessary meaning of 'or' 'and,' as in some instances it does".

I see no reason for construing the word "and" in its context in s. 417(4) otherwise than in its conjunctive or copulative sense.

No contradiction or absurdity results from this construction. On the contrary it appears to be a reasonable one.

The power to license victualling houses, etc., is given, not *simpliciter* but *secundum quid*: that is to say, it is a power to license coupled with the power to limit the number of such houses and to regulate them. In other words the power conferred, though complex in its elements, is indivisible. It is one power. I think the Legislature intended that the power, if exercised at all, should be fully exercised. It is not, in my view, effectively exercised if only one element of the power, that of licensing, is exercised.

The language of s. 417(4) antedates Confederation: See C.S.U.C. 1859, c. 54, s. 261(2). The Legislature presumably intended that the council of a municipality should address their minds to the needs of their community as regards victualling houses, etc., and, having done that, should by by-law determine the number of such houses that should be licensed, and provide for licensing them, and also for their regulation.

The power to limit the number of victualling houses, etc. is, perhaps, not as necessary, since The Municipal Act was amended to include therein the provisions of s. 253, as it was formerly. By that enactment the power to license includes the power to prohibit, and the municipality is, by s. 253(4), given an absolute discretion to grant or refuse a licence; *Re Lem Yuk and City of Kingston* (1926), 31 O.W.N. 14; *Re Hamilton Dairies Ltd and Town of Dundas* (1927), 33 O.W.N. 113 at 115. So also the power of the municipality to regulate victualling houses, etc. is perhaps not to-day of the same importance as it probably was in by-gone times, for the Legislature itself has substantially occupied the field of regulation: See The Factory, Shop and Office Building Act, R.S.O. 1914, c. 229, ss. 2(a), 41, 43, 63, 70 and The Public Health Act, R.S.O. 1914, c. 218, s. 115 and Schedule "B". The Provincial system of regulations has since 1914 been considerably elaborated: See The Factory, Shop and Office Building Act, R.S.O. 1937, c. 194, s. 41(1), also ss. 37 and 39, and The Public Health Act, R.S.O. 1937, c. 299, s. 124, and Schedule B.

Municipal regulations would, of course, be subject to the Provincial enactments: *Re Morrison and The City of Kingston*, [1938] O.R. 21 at 26, [1937] 4 D.L.R. 740, 69 C.C.C. 251, and

could have effect only in so far as they were not inconsistent with the Provincial law.

There seems, however, to be no good reason why municipal regulations cannot supplement the Provincial regulations. Indeed, s. 124 of The Public Health Act authorizes the council of every municipality to pass by-laws with the approval of the Department of Health, for making additional requirements in respect of any of the matters dealt with by the statutory by-law set out in Schedule B. Moreover, the Department may permit the council of any municipality to amend a statutory by-law so as to conform to the requirements of the municipality, or to meet such special circumstances as in the opinion of the Department may warrant such amendment.

Support for the view that the power conferred by s. 417(4) is a power which, though complex in its elements, is indivisible and must be exercised in its entirety, or left alone, appears to be afforded by the decision of Middleton J.A. in *Re Rex v. Cullian*, [1937] O.R. 922, [1937] 4 D.L.R. 670, which Mr. Chitty cited in argument. That case concerned the validity of a by-law of the city of Toronto, which provided that "No person shall erect any sign or other advertising device on any land" abutting on certain named streets. The by-law purported to have been passed under the authority of s. 397(54) of The Municipal Act, R.S.O. 1927, c. 233, by which municipal councils are empowered to pass by-laws "For prohibiting or regulating the erection of signs or other advertising devices, and the posting of notices on buildings or vacant lots within any defined area or areas or on land abutting on any defined highway or part of a highway." Middleton J.A., at pp. 923 and 924, said:

"I think this present by-law is defective because the municipality is empowered to prohibit or regulate the erection of signs or other advertising devices and the posting of notices, but what the council has undertaken to do is to pass a by-law regulating the erection of signs and other advertising devices, but saying nothing whatever about the posting of notices.

"I think the municipal powers are limited by the precise words of the legislative enactment, and the municipality must do all that is authorized by The Municipal Act, or leave the subject alone."

In principle, this decision does not appear to me to be distinguishable.

I am therefore of opinion that by-law no. 11 of 1915 is, at any rate as regards paras. 2 and 3 thereof, invalid. I do not think that para. 3 may be severed from para. 2 and held to be valid. Para. 3 is obviously ancillary to para. 2. The two paragraphs are dependent one upon the other and are inseparable. Moreover, I cannot assume that the council of the defendant municipality would have passed the by-law in the truncated form in which it leaves my hands. "The by-law as it reached the hands of the learned Judge was one thing and as it emerged from his hands, it was a distinctly different thing": *Re Morrison and The City of Kingston, supra*, at p. 28, per Middleton J.A.

Several other contentions were urged by Mr. Chitty, but in view of the conclusion I have arrived at as to the invalidity of the by-law, I do not consider it necessary to express any opinion upon them.

There will, accordingly, be judgment for the plaintiffs declaring paras. 2 and 3 of by-law no. 11 of 1915, to be invalid. The plaintiffs will have the costs of the action.

Judgment accordingly.

Solicitor for the plaintiffs: Charles F. Adams, Dunnville.

Solicitors for the defendant: Bradford & Raney, Dunnville.

[COURT OF APPEAL.]

Baker v. Baker.

Infants — Custody — Welfare of Child — Other Considerations — Desirability of Having Child with Parent.

Although the welfare of a child is the first and paramount consideration in matters of its custody, it is only one amongst other considerations, the most important of which is that the child should be in intimate relation with its parent. *In re Thain; Thain v. Taylor*, [1926] Ch. 676 at 690, applied. Where the father and mother are living apart, the general rule is that the mother, other things being equal, is entitled to the custody and care of the child during its earliest years. *Re Orr*, [1933] O.R. 212, applied.

Where an infant child had been taken by the father and given by him, without the mother's consent, to other persons, with a view to adoption, and the mother sought custody, *held*, since the mother had done nothing to disentitle herself to custody of the child, and since, although she was employed, she proposed to live with her mother, who was willing and able to maintain and care for the child, custody should be awarded to the mother. It was not necessary for the Court to hear evidence as to the conditions under which the child was then living, since, even assuming that its present home was a fit and proper one, and that the child was being properly cared for there, the disturbance which might be incurred as the result of moving it from this home was not sufficient ground for denying, in the interests of the infant, the order sought by its mother.

AN appeal from the order of Plaxton J., made after the trial of an issue, awarding custody of the infant child of the parties to the plaintiff, its mother. The facts are fully stated in the judgment of KELLOCK J.A.

15th January 1943. The appeal was heard by RIDDELL, GILLANDERS and KELLOCK JJ.A.

R. M. Willes Chitty, K.C., for the defendant, appellant: The trial judge made no proper inquiry into the welfare and present condition of the child, and there was no evidence from which a true comparison could be drawn between the foster parents' home, where the child now is, and that of the grandmother, to which it will be taken if this order stands. No evidence whatever was given as to whether a change from the foster parents' custody to that of the mother is in the best interests of the child, which must always be the paramount consideration, and the essential matter for the Court to consider: The Infants Act, R.S.O. 1937, c. 215; *Re D'Andrea* (1916), 37 O.L.R. 30, 31 D.L.R. 751; *Re Clarke* (1916), 36 O.L.R. 498, 31 D.L.R. 271; 5 C.E.D. (Ont.), pp. 816-7, and cases in note (*r*). [KELLOCK J.A.: What status have the Richardsons? This case is dissimilar in that respect to both the *D'Andrea* and the *Clarke* cases. Is not *Re Orr*, [1933] O.R. 212, [1933] 2 D.L.R. 77, more nearly in

point?] The Court has no evidence as to how the foster parents obtained the child. Since the mother abandoned it, first to its father and then to the foster parents, in its early and formative years, she is now precluded from relying on the mother's ordinary right to have the child when it is less than seven years of age.

The onus is on the respondent to show why the custody should be changed at this late date: *Re Steacy* (1922-23), 52 O.L.R. 579. Throughout the cases, it is obvious that each decision must be based upon the welfare of the child, and the Court should therefore carefully scrutinize all the circumstances. If the trial judge's mind had been directed to the real issue, he would not have given judgment without complete evidence as to the home in which the child now is, and that which the mother would provide. [KELLOCK J.A.: Even assuming that the child is now living under beneficial conditions, if the mother also has a good home to offer, is her right to claim her own child entirely displaced?] It is submitted that the mother is not entitled to the child until the Court can reasonably decide the rights of all parties concerned, including the foster parents as well as the father. [KELLOCK J.A.: The Court decided the reverse of that in the *D'Andrea* case.] Even if that is so, I submit that the Court would have difficulty in assuming that this child would be better off with its mother than with the foster parents. The Court should remit the matter for a complete hearing, with the foster parents as parties to the issue.

Morris Simon (for *I. Aaron*, absent on active service), for the plaintiff, respondent: It is a well-established principle that where a parent has led a blameless life and is in a position to provide the child with a good home, the child's place is with that parent: *In re Thain; Thain v. Taylor*, [1926] Ch. 676 at 690. There has been no abandonment of this child by its mother, as there had been in each of the cases cited by the appellant. There is every evidence that the child will have a satisfactory home with its mother and grandmother.

It is plain that the defendant does not want custody of the child. He has led an irregular life, while his wife has been guilty of no behaviour which would disentitle her to the custody of her own child. The onus is on the appellant to prove that such behaviour has occurred; otherwise the child's natural place is with its mother: *In re O'Hara*, [1900] 2 Ir. R. 232. A child

must not be regarded as a chattel, movable at will, and as fancy dictates. The contest in this case is between a mother and third persons, whose status is seriously in question; if this Court remitted the case for a new trial, what status would the Richardsons have?

This case is distinguishable from *Re Orr, supra*. This mother did not abandon her child; it was taken from her by the appellant, who had deserted his wife, and there is no evidence that he had taken legal proceedings indicative of any disapproval of his wife's conduct. The onus is now on him to show that her conduct was ever such as to render her unfit to have custody of the child. There is no evidence that the father ever provided maintenance for the child at the foster home, or that he now intends to do so.

There are innumerable authorities to support the proposition that a wide discretion is vested in judges to whom applications for custody are made, and also that the parent's rights should be suspended or superseded only in exceptional circumstances. Unless it is apparent that the foster parents would contribute greatly to the child's welfare, its own parent is the right and proper person to have custody. The Infants Act provides that the wishes of the mother, as well as those of the father, are to be considered. A normal well-ordered home is to be preferred to a foster home, however good: *Re Orr, supra*; *In re O'Hara, supra*.

R. M. Willes Chitty, K.C., in reply.

Cur. adv. vult.

29th January 1943. RIDDELL J.A.:—At the conclusion of the argument I was ready to dismiss this appeal. Further consideration has not modified my view. I agree in the reasoning and conclusion of my brother Kellock, and would dismiss the appeal with costs.

GILLANDERS J.A. agrees with KELLOCK J.A.

KELLOCK J.A.:—An appeal from an order of Plaxton J., dated 30th October 1942, after the trial of an issue as to the custody of Cornelia May Baker, infant child of the parties. The issue was directed after decree *nisi* in an action for divorce and custody brought by the respondent wife against the appellant.

The infant was born 26th August 1937. In May 1939 the appellant left the respondent, taking the infant with him to his parents' home. At this time the child and its parents had been living with the respondent's parents in Toronto. The appellant stated in evidence that his reason for leaving his wife was that she had not taken proper care of the child. It appears that shortly after this the respondent laid a complaint in the Family Court against the appellant for desertion, as a result of which an order was made in favour of the respondent for payment of a small amount for maintenance. In the Family Court proceedings the respondent wished to have her child restored to her, but was advised that that court had no jurisdiction to deal with custody. The appellant, for his part, stated in that court that he had the child boarding out, and that he would not tell the respondent where it was unless an order were made by a court directing him to do so. The record states that in those proceedings arrangements were made, presumably by consent, by which the respondent was to be permitted to see her child once a week. The respondent says that following this she visited the child until eventually she was refused admittance by the appellant's parents.

This action was commenced on 20th October 1941, and in her statement of claim the respondent asked for a decree of divorce and for custody. About this time she had learned that her child had been given out for adoption. After the decree *nisi* on 22nd December 1941, her solicitor ascertained from the provincial officer the whereabouts of her child, which was then living with people by the name of Richardson, at Dixie, outside Toronto. The respondent visited the child at the Richardsons' periodically until an occasion when she was denied access. She says that while she learned during the course of the proceedings in the Family Court that custody was a matter to be dealt with by the Supreme Court, she was then unemployed and without means. She later appears to have obtained employment in a hospital about November or December 1939.

If given custody she now proposes to bring the child to her mother's home, and the grandmother is willing to look after the child while the mother is at work. The home has been investigated by a representative of the Children's Aid Society, and it would appear from the evidence that the home is un-

objectionable and that the mother is in a position to maintain the child.

The appellant definitely does not want the child himself, but neither does he want the respondent to have it. He desires that it remain with the Richardsons and be adopted by them. It appears that in the proceedings which have been taken to that end, it was not proposed to apply to the mother for any consent.

At the hearing before Plaxton J., the appellant appeared in person. The issue was apparently on the peremptory list for trial on 23rd October, when the Richardsons were present with the child. The trial did not then proceed, and the case came on again a week later, at which time the appellant appeared but the Richardsons did not. The day before the trial the respondent's counsel notified both the appellant and the solicitor who had acted for the Richardsons at an earlier stage, that it would proceed the next day. The registrar at the hearing informed the Court that this solicitor had advised him that he had no instructions. When the respondent's case was in, the appellant then applied for an adjournment on the ground that he wished to call a witness whose attendance he had been unable to procure. This proposed witness was an official of the Family Court, and the appellant desired his presence to produce the records of that court as to occasions when this officer had interviewed the respondent at the appellant's instance with regard to the appellant's complaints that the respondent was neglecting the child. These occasions were prior to the proceedings taken by the respondent against the appellant for desertion, to which reference has already been made. The appellant's application was not granted, and the trial proceeded. The appellant gave evidence, and the learned judge awarded the custody of the child to the respondent. It is from this order that this appeal is brought.

In the argument of the appeal the appellant was represented by Mr. Chitty who advised the Court he was also instructed by the Richardsons, although they are not parties to these proceedings. It was argued on the appellant's behalf that the evidence at the trial had not been directed to the real issue, and that, as the welfare of the child is paramount, the learned trial judge ought not to have disposed of the issue without having required that evidence be called as to the conditions under

which the child was living with the Richardsons. Although no such application was made to the learned trial judge, this would not, in a case of this kind, stand in the way of the appellant if, in the opinion of the Court, the matter could not be properly dealt with without such evidence. In considering the "welfare of the child", it is well settled that this phrase is not to be construed as involving material considerations only, and in my opinion this appeal can and should be disposed of on the facts already proved and on the assumption that the Richardsons' home is a fit and proper one, and that the child is being properly cared for there.

As has been already stated, the father does not want custody. He is living with another woman, the co-respondent in the main action, by whom he has had a child. The plaintiff denies any neglect of her child, and in my opinion has not, by her conduct, precluded herself from asking for custody. The question for decision then appears to be whether such disturbance to the child as may be incurred should it be removed from the circumstances in which it has been for approximately three years, is sufficient ground for denying, in the interests of the infant, the order which the plaintiff seeks. It must also be remembered that the plaintiff has been endeavouring to obtain an order since October of 1941, and in my opinion she has satisfactorily explained any delay there may have been prior thereto.

Mr. Chitty referred us to the following cases: *Re Clarke* (1916), 36 O.L.R. 498, 31 D.L.R. 271; *Re D'Andrea* (1916), 37 O.L.R. 30, 31 D.L.R. 751; *Re Steacy* (1922-23), 52 O.L.R. 579. I see nothing in any of these which precludes the Court, on the facts of this case, from applying the principle acted upon in *In re Thain*; *Thain v. Taylor*, [1926] Ch. 676 at 690, namely: "The welfare of the child is no doubt the first and paramount consideration, but it is only one amongst several other considerations, the most important of which it seems to me, is that the child should have an opportunity of winning the affection of its parent, and be brought for that purpose into intimate relation with the parent." What is there said as to any disturbance to a child consequent upon its removal from a home where it had been for some years, is also applicable here. In that case the child had been separated from its parent for a much longer period than is the fact in this case. In *Re Orr*, [1933] O.R. 212, [1933] 2 D.L.R. 77, the Court refers to *In re Thain*, *supra*, and to what is said by FitzGibbon L.J. in *In re*

O'Hara, [1900] 2 Ir. R. 232, namely: "Where a parent is of blameless life and is able and willing to provide for the child's material and moral necessities . . . the Court is, in my opinion, judicially bound to act on what is equally a law of nature and of society, and to hold (in the words of Lord Esher [in *Reg. v. Gyngall*, [1893] 2 Q.B. 232]) that 'the best place for a child is with its parent'."

In the *Orr* case the judgment of the Court contains the following: "In the case of a father and mother living apart and each claiming the custody of a child, the general rule is that the mother, other things being equal, is entitled to the custody and care of a child during what is called the period of nurture, namely, until it attains about seven years of age, the time during which it needs the care of the mother more than that of the father, and then the father as against the mother becomes entitled to the custody and care of his child". In the circumstances of that case the Court found ground for refusing the father's application in favour of the maternal grandparents, to whose care the father had previously committed his child on the terms of a written agreement. The Court was of the opinion that the grandparents in that case really stood in the place of the deceased mother.

In my opinion the proper order in the circumstances of this case is to place the child in the custody of the respondent, its mother. My view is that it is in the interests of this child that it should receive the care of its mother and be brought up in intimate relations with her. I do not think that any condition should be imposed upon the respondent requiring her to pay for the child's past maintenance by the Richardsons, as was alternatively urged by Mr. Chitty. She was not a consenting party to the placing of the child with them.

I therefore think that the discretion of the learned judge from whose order this appeal is brought, was properly exercised, and that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the plaintiff, respondent: Irving Aaron, Toronto.

Solicitor for the defendant, appellant: J. Arnold Shapiro, Toronto.

[COURT OF APPEAL.]

Rex v. MacDonald.

Criminal Law—"Motor Manslaughter"—Jury, on Indictment for Manslaughter, Acquitting of that Offence and Disagreeing as to Dangerous Driving—Subsequent Arraignment of Accused on Same Indictment—The Criminal Code, R.S.C. 1927, c. 36, ss. 285(6), 951(3), as enacted by 1938, c. 44, ss. 16, 45.

Where, upon an indictment for manslaughter arising out of the operation of a motor vehicle, the jury report that they find the accused not guilty of manslaughter, but that they are unable to agree as to the charge of dangerous driving, under s. 285(6) of The Criminal Code, as enacted in 1938, there is nothing in s. 951(3), as re-enacted in the same year, to prevent the trial judge from recording this verdict and discharging the jury. If this is done, the accused cannot be again arraigned upon the same indictment, since he has been acquitted of the only offence alleged therein. It cannot be said, in any strict sense, that the effect of s. 951(3) is to add a second count to every indictment for manslaughter.

AN appeal by the Attorney-General, under s. 1013(4) of The Criminal Code, R.S.C. 1927, c. 36, as re-enacted by 1930, c. 11, s. 28, from the order of Hope J. discharging the respondent from custody. The facts are fully stated in the judgment.

11th January 1943. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and KELLOCK JJ.A.

C. R. Magone, K.C., for the Attorney-General, appellant: The trial judge had no jurisdiction to determine the validity of the plea of *autrefois acquit*, since the trial of an issue under s. 907 of The Criminal Code, R.S.C. 1927, c. 36, must be by jury: Crankshaw's Criminal Code, 6th ed., p. 1076; *Rex v. Sweetman* (McTague J., unreported); *Rex v. Ballard*, 58 C.C.C. 215, 5 M.P.R. 136, [1932] 4 D.L.R. 461; Archbold, 29th ed., p. 149. [ROBERTSON C.J.O.: The trial judge, in the result, appears to have done the right thing so far as he went, since he could not proceed upon the charge of manslaughter. Had the Crown laid a new charge, under s. 285(6), then the accused might have set up this plea, to which the Crown would have replied that he had not been acquitted of that offence. Is there any case similar to this?] The "court" in s. 907, means judge and jury: *Rex v. Hansher & Burgess*; *Rex v. Simone & Bowen*, 74 C.C.C. 73, [1940] O.R. 247, [1940] 3 D.L.R. 478.

There are in effect two counts, for separate charges. The jury having found the accused not guilty as to one, and disagreed as to the other, the second charge must be disposed of by another jury. [ROBERTSON C.J.O.: Is there no case where, two counts having been laid, and the jury having acquitted on

one, it was held that, the facts being the same, a plea of *autrefois acquit* would lie with respect to the other?] That principle is laid down in s. 909 of the Code, but it does not apply in this case. If the indictment is to be considered as containing only one count, then there is a disagreement of the jury as to the whole charge. Subss. 1, 2 and 3 of s. 951 must be distinguished, since subs. 1 differs from the other. Before the enactment of subs. 3, it was the practice to include additional counts in such cases. Unless s. 951(3) is regarded as remedial, this practice must again be adopted.

When the jury reported that they could not agree, Chevrier J. should have endorsed the indictment to that effect, and should not have endorsed an acquittal upon the charge of manslaughter: *Rex v. Mondt*, 60 C.C.C. 273, [1933] O.W.N. 101, [1934] 1 D.L.R. 382. He should have discharged the jury under s. 960. Should this practice be upheld, the Crown would have no right of appeal, since there has not been an acquittal: *Rex v. Wilmot*, [1941] S.C.R. 53, 75 C.C.C. 161, [1941] 1 D.L.R. 689. If, under the *Wilmot* case, it is not an acquittal, then something remains to be tried, there being a disagreement endorsed upon the indictment. [ROBERTSON C.J.O.: If there were no such provision as s. 960, what would be the position?] We should then be governed by *Winsor v. The Queen* (1866), L.R. 1 Q.B. 390, where it was held that the trial judge had a discretion which could not be reviewed as to discharging the jury. Hope J. has so interpreted s. 951(3) as to nullify the effect of the decision in the *Winsor* case.

[GILLANDERS J.A.: Surely the respondent cannot be tried again for manslaughter?] If Chevrier J. was right in endorsing the indictment as he did, there cannot be another trial for manslaughter. The so-called remedial sections confuse matters to such a degree as to endanger the careful plan of criminal procedure in such cases as this.

G. A. Martin, for the accused, respondent: There was no need to empanel a jury as to the special plea, since the indictment before the Court was the very one which had previously been before it.

The accused was charged with manslaughter, and by the operation of s. 951(3) he could be convicted, on that indictment, of an offence under s. 285(6). He was therefore in peril on that charge, and s. 907 is therefore applicable, provided the first

trial reached its conclusion by a verdict, and the whole trial was not abortive. Unquestionably, where an accused is charged with a single offence and the jury disagree, he cannot plead *autrefois acquit*, because there has been no verdict: *Winsor v. The Queen, supra*. No case, however, can be found holding that where a verdict is returned which is responsive to the very indictment before the Court, a failure of the jury to agree on some minor charge, or an "included" offence, is a failure to reach a verdict which will render the trial abortive and preclude the accused from pleading *autrefois acquit*. The basis of this special plea is that the accused cannot be put twice in jeopardy. [ROBERTSON C.J.O.: But the accused is often put in jeopardy twice, for example, where a new trial is ordered after a disagreement. You want this verdict to be read as if the jury had found the accused not guilty of other charges, as to which they came to no conclusion.] With respect to any lesser offence included in the charge, the accused need only show that he could have been convicted of that offence on the indictment as laid: Archbold, 30th ed., p. 146.

Apart from s. 951(3), dangerous driving is not a lesser offence, or included in a charge of manslaughter, so that a verdict of guilty of dangerous driving could be returned on an indictment for manslaughter: *Rex v. Stringer* (1933), 24 Cr. App. R. 30. The power to return a verdict for that offence is derived wholly from s. 951(3), and must be taken with the limitations imposed by the statute. The words "the jury" must mean the jury that is dealing with the charge of manslaughter before them. There was no separate count for dangerous driving included in this indictment. [ROBERTSON C.J.O.: From a strict reading of s. 951(3), it might be said that it deals only with the consequences of such a conviction. An anomalous result seems to have been reached. The accused was charged with a graver offence, wrongly, according to the jury, and is now discharged on a charge for a less serious offence of which the jury did not find him not guilty.]

The jury has a choice, under s. 951(3). They are entitled, if they think proper, to convict the accused of the less serious offence. Since they did not do so, but returned a verdict of not guilty of manslaughter, that is an end of the whole matter. They were not required to return any verdict at all as to the offence of dangerous driving.

Reg. v. Grimwood (1896), 60 J.P. 809, is directly in point. Archbold, 30th ed., at p. 218, cites that case as authority for the principle that "if the counts merely vary the legal description of a single transaction, it may be that a plea of *autrefois convict* or *acquit* would be sustainable". This is merely the common law principle of fairness which runs through all criminal proceedings.

On the wording of s. 907, in conjunction with a strict interpretation of s. 951(3), the judgment appealed from is right. No other jury can deal with the facts, the first jury not having been "satisfied" that the accused was guilty of dangerous driving. A disagreement in such circumstances is equivalent to an acquittal. See 54 Law Quarterly Review, p. 338.

C. R. Magone, K.C., in reply.

Cur. adv. vult.

18th February 1943. The judgment of the Court was delivered by

ROBERTSON C.J.O.: This is an appeal by the Attorney-General for Ontario, under s. 1013(4) of The Criminal Code, R.S.C. 1927, c. 36, against the judgment of Hope J. at the Toronto Assizes, on 10th November 1942, discharging the respondent from custody on a plea of *autrefois acquit*. Respondent had been indicted at an earlier Assize on the charge that, in the month of January, in the year 1942, he unlawfully did kill and slay one Arline Robinson, and did thereby commit the indictable offence of manslaughter, the said charge of manslaughter arising out of the operation of a motor vehicle.

It is provided by s. 951(3) of The Criminal Code, as enacted by 1938, c. 44, s. 45, that:—

"Upon a charge of manslaughter arising out of the operation of a motor vehicle the jury, if they are satisfied that the accused is not guilty of manslaughter but is guilty of an offence under subsection six of section two hundred and eighty-five may find him guilty of that offence, and such conviction shall be a bar to further prosecution for any offence arising out of the same facts."

Subsection 6 of s. 285, as enacted by 1938, c. 44, s. 16, referred to in s. 951(3), is as follows:—

"Everyone who drives a motor vehicle on a street, road, highway or other public place recklessly, or in a manner which is

dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the street, road, highway or place, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on such street, road, highway or place, shall be guilty of an offence and liable

“(a) upon indictment to imprisonment for a term not exceeding two years or to a fine not exceeding one thousand dollars or to both such imprisonment and fine; or

“(b) on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding one hundred dollars or to both such imprisonment and fine.”

Respondent was tried on the indictment above mentioned before Chevrier J. and a jury in May 1942, when the jury, after having, it may be assumed, been instructed fully by the trial judge in regard to the provisions of s. 285(6) and of s. 951(3), and after considering their verdict, returned into court and reported that they seemed unable to agree “on the negligence on the dangerous driving; on just what degree it is.” After some further instruction from the trial judge the jury retired to further consider their verdict. Again they returned into court, and on this occasion definitely reported that they found respondent not guilty of manslaughter, but added, “we cannot agree on the lesser charge.” After some discussion between the trial judge and counsel as to possible difficulties arising from this situation, the jury once more retired, saying that they would try again. In the end the jury returned, and on being asked, “Have you agreed on your verdict on the dangerous driving?” the foreman answered, “No, we cannot agree.” Thereupon, with the unanimous concurrence of the jury, the trial judge recorded as their verdict, the following, which he endorsed upon the indictment and signed:—“Jury report—not guilty of manslaughter but cannot agree on dangerous driving.” The jury were thereupon discharged, and the record contains the note, “Bail for the accused continued.”

At the next Toronto Assizes respondent was brought before Hope J. upon the same indictment. After argument, that learned judge gave effect to a plea of *autrefois acquit*, based upon what had occurred on the trial before Chevrier J. in May, and discharged respondent from custody.

Various suggestions were made in argument before us as to the effect of what occurred on the trial before Chevrier J. It was suggested that as the jury failed to agree on a verdict that completely disposed of the charge in the indictment, there was no verdict at all that the Court could accept, and the whole matter must be tried again. On the other hand, there was the contention that a verdict of acquittal of manslaughter having been accepted, there is an end of the whole matter, for the Court could not accept a partial verdict. For this *Reg. v. Grimwood* (1896), 60 J.P. 809, is cited. Again it was suggested that the indictment is to be regarded as containing two counts, one a charge of manslaughter, and the other a charge of dangerous driving, and that while the respondent may be entitled to say he was acquitted of manslaughter, there remains undisposed of, on this same indictment, the count as to dangerous driving, and for that he must still stand his trial on this indictment. In support of this, reference was made to what was said by Crocket J. in *Rex v. Wilmot*, [1941] S.C.R. 53 at p. 60, 75 C.C.C. 161 at p. 167, [1941] 1 D.L.R. 689. As against this, it was argued that the indictment was for manslaughter only, and that the right to convict for dangerous driving on such an indictment is incidental to the charge of manslaughter, and therefore can be exercised only by a jury trying the charge of manslaughter, and as there is already an acquittal on that charge, there can be no further trial on this indictment.

These were not all the arguments addressed to us, but they serve to illustrate the differences in point of view. It seems to me that the proper approach to the problem this case presents is to consider what s. 951(3) really says, for it is only by reason of that enactment that the question arises. If it were not for the statute a prisoner could not, on a charge of manslaughter, be convicted of an offence under s. 285(6). The latter offence has not that relation to the crime of manslaughter that, properly, it can be termed a "lesser offence" in the sense that the commission of the crime of manslaughter includes the commission of the other offence: *Rex v. Stringer* (1933), 24 Cr. App. R. 30, and see *Rex v. Parker*, [1939] O.R. 531, 72 C.C.C. 216, [1939] 4 D.L.R. 246. If there were that relation between the two offences, it would indeed have been needless to enact subs. 3 of s. 951, for subs. 1 would already have provided all that is necessary.

I am quite unable to see how, in any strict sense, it can be said that the effect of s. 951(3) is to add a second count to the indictment charging manslaughter. For some important purposes it clearly has not that effect. The accused, on arraignment, pleads only to the charge of manslaughter. He is not asked to plead to a second count. Such an indictment is not within s. 857 and s. 858 of The Criminal Code, which provide for separate trials, in the discretion of the trial judge, upon the several counts of an indictment that contains more than one count, for it is only the jury that are satisfied that the accused is not guilty of manslaughter who, on an indictment for manslaughter, can find him guilty of an offence under s. 285(6). I do not find in the judgments of any of the learned judges of the Supreme Court of Canada in the case of *Rex v. Wilmot*, *supra*, anything to the contrary of this, notwithstanding certain expressions that are relied upon here by counsel for the Attorney-General. The matter under consideration in that case was the right of the Attorney-General for the Province to appeal to the Supreme Court of Canada under s. 1023(2) of The Criminal Code, and the question under discussion was whether there had been an "acquittal" within the meaning of that subsection. The majority of the judges in the Supreme Court of Canada were of the view that there was not a judgment or verdict of acquittal when, on the charge of manslaughter, the jury had, under the provisions of s. 951(3), convicted of an offence under s. 285(6).

The purpose and effect of s. 951(3), in my opinion, are plain enough upon the wording of the enactment, without adding words that it does not contain. When a jury are considering their verdict upon a charge of manslaughter arising out of the operation of a motor vehicle, if they are satisfied that the accused is not guilty of manslaughter, they are not limited to a finding of "not guilty" of that offence, but may consider further whether the accused is guilty of an offence under s. 285(6), and if they are satisfied that he is guilty, they may find him guilty of that offence. To give effective operation to the enactment, it is not necessary to imply a second charge in the indictment. The plain provision of the subsection is that on a charge of manslaughter arising out of the operation of a motor-vehicle, the jury may find the accused guilty of an offence under s. 285(6).

Dealing next with the question whether Chevrier J. was right in accepting a verdict of not guilty of manslaughter, and discharging the jury when they could not agree upon the proper finding in respect of an offence under s. 285(6), I find nothing in s. 951(3) to the contrary of the practice followed. Beyond question the jury were bound first to consider and to reach a conclusion upon the question whether or not the accused was guilty of manslaughter. The statute says so: *Rex v. Merritt*, [1933] O.R. 786, 60 C.C.C. 295, [1933] 4 D.L.R. 483. Respondent having been indicted and tried for manslaughter, and having satisfied the jury who tried him on an indictment for manslaughter, that he was not guilty of that offence, and that finding having been announced, why should he be tried again for that offence? To do so would be contrary to the principle that underlies s. 15 of The Criminal Code, and to a long-established rule of the common law that a man may not be put twice in peril for the same offence. I can find nothing in s. 951(3) to deprive such a finding of its ordinary effect, nor do I see anything to require any departure from the ordinary procedure prescribed for trial upon indictment, except in so far as may be necessary to enable the jury, if they find the accused not guilty of manslaughter, and are satisfied that he is guilty of an offence under s. 285(6), to proceed further and to find him guilty of the latter offence. Presumably, although the statute does not in terms say so, a simple verdict of "not guilty" on the indictment, without more, would acquit the accused under the common law rule already referred to, of both the offence of manslaughter and an offence under s. 285(6). A conviction of the latter offence would, by the express provision of the subsection "be a bar to further prosecution for any offence arising out of the same facts." Where, as here, the jury are agreed only on a verdict of not guilty of manslaughter, why can they not bring in that verdict, although they cannot agree on anything more? Again, to return to the terms of s. 951(3), it is an enabling section. It adds to the power of the jury in the circumstances that it predicates. I see nothing in it to prevent the jury doing what a jury could do before it was enacted. It is a matter for the trial judge to decide whether it has become necessary to discharge the jury before they have agreed upon their verdict: *Winsor v. The Queen* (1866), L.R. 1 Q.B. 390. This jury had agreed upon their verdict so far as the offence of manslaughter is concerned, and announced their find-

ing in open court. That verdict was endorsed upon the indictment. The trial judge discharged the jury after that had been done, solely by reason of their inability, after several attempts, to reach an agreement in regard to the other offence which s. 951(3) gave them power to pass upon. No doubt the situation is an unusual one, but so are the provisions of s. 951(3). I see nothing to warrant the conclusion that the trial judge could not accept and give effect to a verdict of not guilty of manslaughter, although the jury could not agree upon a verdict in regard to an offence under s. 285(6). In my opinion the respondent cannot be again tried upon the charge of manslaughter, for he has been tried once and has been acquitted.

A disagreement of the jury is neither a conviction nor an acquittal: *Winsor v. The Queen*, *supra*, at p. 395. The rule against placing an accused person twice in peril for the same offence does not stand in the way of a new trial where the jury have failed to agree and are discharged. Respondent contends that the verdict acquitted him of any offence of which the jury could have convicted him, citing *Reg. v. Grimwood*, *supra*. In that case there were four counts, all based upon the same transaction. The jury disagreed as to the first three counts, but convicted on the fourth count, which was for the least offence of all. It was held that the prisoner was entitled to succeed on a plea of *autrefois convict* when again placed on trial on the first three counts. The lesser offence, of which the prisoner then was convicted, was included in each of the three graver offences, and to convict him on a new trial for any of them would be to convict him a second time for the offence of which he had been once convicted. That is not at all this case.

The question whether, on a fresh indictment charging an offence under s. 285(6), a plea of *autrefois acquit* is available to respondent, is not before us on this appeal, and so far there has been no new indictment. In my opinion the respondent cannot be tried again upon the indictment that was before Chevrier J. The only charge in that indictment being for manslaughter, of which respondent has been acquitted, respondent cannot, in my opinion, be tried again for any offence on that indictment.

Objection was taken on the part of the appellant that Hope J. adopted an improper procedure in dealing with the plea of *autrefois acquit*. It was urged that he could proceed only with a jury.

In my opinion the case was not one for a plea of *autrefois acquit*. The record upon which the Crown sought to proceed before Hope J. bore upon it the evidence that the case had been tried and a verdict found on the only charge contained in the indictment. That was an end of that indictment, for the respondent could not be tried for an offence under s. 285(6) upon it, except as incidental to the charge of manslaughter. No further plea to that indictment was either necessary or proper. The respondent was entitled to be discharged. In fact, in disposing of the matter it was substantially on that ground that Hope J. proceeded. To avoid any question about it, the finding for respondent on the plea of *autrefois acquit* endorsed upon the indictment should be set aside, and in place of it there should be a simple order for the discharge of respondent upon the charge in this indictment.

Order accordingly.

Solicitor for the Crown, appellant: C. R. Magone, Toronto.

Solicitors for the accused, respondent: Shuyler & Ecclestone, Toronto.

[ROSE C.J.H.C.]

Re Flavelle Estate.

Succession Duties—Validity of Tax on “Dispositions” Made in Testator’s Lifetime—The Succession Duty Acts, 1934 (Ont.), c. 55; R.S.O. 1937, c. 26; as amended by 1937, c. 3, and 1937, 2nd sess., c. 1—ss. 9(c), 10(g), 19(1).

The provisions of The Succession Duty Acts rendering subject to duty dispositions made by a deceased person in his lifetime are *intra vires* of the Legislature of Ontario. It is the disposition itself, and not the person to whom the disposition is made, that is subjected to tax, but it does not follow that because the disposition is non-existent, either in Ontario or elsewhere, at the time of the death, the taxation is not within the Province, within the meaning of s. 92(2) of The British North America Act. The mere fact that inequalities and hardships may necessarily arise in the application of the Act does not render it invalid. Although s. 19(1), imposing a liability for duty upon the persons to whom dispositions are made, is not in terms limited to such persons as are domiciled in Ontario, it must be read as so limited, since the enactment cannot be effective outside the sphere of the Province’s legislative jurisdiction.

Succession Duties—Direction to Pay Duties out of General Estate—Whether Duty Payable on Duties so Paid—The Succession Duty Act, 1937, as amended, ss. 1(g), 10, 19(1).

Where a testator directs his executors to pay succession duties out of his general estate, no duty is payable, under the Act of 1937, as amended, on the amounts so paid by the executors. The Ontario Act

does not impose a legacy duty strictly so called, and there is nothing in it to subject such an indemnity to the payment of duty. It is not "property passing" to the beneficiary, or to any person other than the treasurer.

Trustees and Executors—Application for Advice—Right to Raise, on such Application, Question of Constitutional Validity of Statute—The Trustee Act, R.S.O. 1937, c. 165, s. 59—Rule 600.

An executor is entitled, on a motion for the opinion, advice and direction of the Court, to raise the question of the constitutional validity of a statute imposing a succession duty, in much the same way as such a question would be raised if the executor, having paid the duty, were called upon by a beneficiary to account.

A MOTION by the executors and trustees of the estate of Sir Joseph Flavelle, Bart., deceased, for the opinion, advice and direction of the Court.

23rd to 27th September and 1st to 4th October 1940. The motion was heard by ROSE C.J.H.C. in Weekly Court at Toronto.

Glyn Osler, K.C., H. C. Walker, K.C., and J. T. Gow, for the executor.

W. N. Tilley, K.C., and C. F. H. Carson, K.C., for children of the testator.

R. F. Wilson, for the Public Trustee, representing the Board of Trustees for certain charities interested in one-half of the residue.

J. R. Cartwright, K.C., and G. D. Watson, for Miss M. Gladman, a pecuniary legatee and a donee.

Peter White, K.C., and T. Moss, K.C., for a grandson.

G. W. Mason, K.C., for the United Church of Canada.

P. D. Wilson, K.C., Official Guardian, for infants.

D. L. McCarthy, K.C., C. R. Magone, K.C., and J. D. O'Brien, K.C., for the Provincial Treasurer and for the Attorney-General.

H. G. Keen, for F. C. Noton and Douglas Andrews, pecuniary legatees not served with notice of motion.

20th February 1943. ROSE C.J.H.C.:—It is a matter of deep regret to me that, because of circumstances beyond my control, judgment upon this motion has been so long delayed, with, I fear, resulting inconvenience to the many persons interested in the result.

The case, because of the large amounts of money involved, is of great importance to the persons directly concerned, although as it must turn to a considerable extent upon the meaning and effect of The Succession Duty Act of 1934 (1934, c. 55), as amended by The Succession Duty Amendment Act of 1937

(1937, c. 3) and The Succession Duty Amendment Act, 1937, No. 2 (1937, 2nd session, c. 1), it may not be of great general interest in view of the fact that there was a complete re-casting of the statute law in 1939 by The Succession Duty Act of 1939 (1939, 2nd session, c. 1).

Sir Joseph Wesley Flavelle, Baronet, died on March 7th, 1939, leaving a will dated September 24, 1937, and a codicil dated July 6, 1938. Probate of the will and codicil was granted on April 14, 1939, to National Trust Company Limited, the executor and trustee named in the will. The testator's domicile at all material times was in Ontario, and his residence at the time of the making of his will and at his death was in Toronto.

In his lifetime he had made many "dispositions"—to use the word used in the statute—of property, some of these being gifts of considerable value to members of his family, and many of them being smaller gifts to other persons and to charities.

In the will, after clauses appointing trustees and executors and disposing of certain insurance moneys, clause IV gives all the testator's remaining property to the trustee upon trusts which are set out in many paragraphs or sub-clauses, each of which is designated by a letter or letters. Sub-clauses (a) to (e) inclusive make certain specific devises and bequests; clause (f) confers certain powers as to investments, and clause (g) as amended by the codicil is as follows:—

"(g) To pay my just debts, funeral and testamentary expenses as soon after my death as conveniently may be; and to pay out of my general estate the succession duties and inheritance and death taxes that may be payable by reason of my death whether in respect of gifts made or trusts created by me in my lifetime or in respect of gifts, devises and bequests contained in this my Will or in any Codicil thereto or in respect of insurance upon my life or in any other respect whatsoever, saving and excepting such succession duties and inheritance and death taxes as shall be payable in respect of any estate or interest (other than the interest of my children in the residuary bequests contained in paragraph IV(zn) hereof) that shall take effect only after the expiration of any life estate or interest created by any trust heretofore or hereafter made by me or by this my Will or by any Codicil thereto;" the change made by the codicil being the insertion of the words above *itali-*

cized, "out of my general estate". The codicil also adds this declaration of intention:

"it being my intention that the payment of succession duties and inheritance taxes so to be made by my Trustees shall be in relief of all payments of duties or taxes for which either the property in respect of which such payment is made or the beneficiaries in respect of such property might otherwise be liable."

Sub-clauses IV (i) to (zl) deal with the setting aside of funds for children and grandchildren and with a large number of pecuniary legacies. Sub-clause (zm) makes the preceding provisions a first charge on the estate. Sub-clause (zn) directs the trustees "out of and to the extent only of the remainder of my estate, to provide for" (IV (zn) (1 to 6)) certain gifts for religious, educational and charitable purposes, and (IV (zn)) to dispose of the residue of the estate by adding one-half of it to funds earlier in the clause directed to be set up for children, and by paying or transferring the other half to a board of trustees directed to be set up for charitable, religious or educational purposes to be carried out within Ontario. The other parts of the will do not appear to be of importance on the present motion.

The executor, by originating notice of motion, has asked the opinion, advice and direction of the Court upon certain questions arising (to quote from the notice of motion) "in the administration of the Estate of the said deceased under the terms of paragraph IV(g) of the will of the deceased as altered by the codicil thereto, and under the relevant provisions of the Succession Duty Acts of Ontario, and in particular those provisions thereof relating to dispositions". The questions are the following:

"1. Must the executor pay out of the general estate of the deceased succession duties computed in accordance with the relevant provisions of the Succession Duty Acts in respect of all gifts made or trusts created by the deceased in his lifetime not expressly excepted under said paragraph IV(g) provided the gift or trust is a disposition which the said Acts purport to render dutiable?

"2. (a) Is succession duty payable under said paragraph IV (g), whether on gifts inter vivos or on gifts, devises or bequests by the will and codicil itself a dutiable gift or legacy?

“(b) If it is, is the duty in respect thereof payable under paragraph IV(g)?

“(c) If it is so payable, is the amount thereof an additional gift or legacy on which further succession duty is payable under said paragraph IV(g)? If it is, how should duty payable under Paragraph IV(g) be computed?”

The Treasurer of Ontario is one of the persons to whom the notice is addressed and upon whom it was served, and, pursuant to s. 32 of The Judicature Act, notice has been given to the Attorney-General for Canada and the Attorney-General for Ontario that the constitutional validity of The Succession Duty Act, and in particular the provisions thereof relating to dispositions, will be brought in question upon the application. The Attorney-General for Canada was not represented at the hearing. The Department of the Attorney-General for Ontario asked the applicant's solicitors for particulars of the constitutional point proposed to be argued, and the applicant's solicitors answered that as the statutes referred to in the originating notice are taxing statutes “it will be argued that they, and in particular the provisions thereof relating to dispositions, do not impose direct taxation within the Province in order to the raising of a revenue for provincial purposes.” The notice, in addition to being served upon the persons most largely interested in the questions proposed to be raised, was sent by post to a large number of other persons who, as the executor understood, are alleged by the Department of the Provincial Treasurer to have received dutiable legacies or dispositions. It was suggested at the hearing that it might be declared that all of these last-mentioned persons who did not appear by counsel might be declared to be sufficiently represented by those who did appear, and that declaration I think ought to be made. It was also suggested that counsel for the Public Trustee might be appointed to represent any unborn issue interested in the residue. That appointment may also be made.

By s. 59 of The Trustee Act (R.S.O. 1937, c. 165) a trustee is given the right, without the institution of an action, to apply for the opinion, advice or direction of the Court on any questions respecting the management or administration of the trust property or the assets of the testator; and the trustee, acting upon the opinion, advice or direction given, shall be deemed, so far as regards his own responsibility, to have discharged his

duty as such trustee in the subject matter of the application, unless he has been guilty of some fraud, wilful concealment or misrepresentation in obtaining such opinion, advice or direction. And by Rule 600 executors or administrators may apply by originating notice for, *inter alia*, the opinion, advice or direction of a judge pursuant to The Trustee Act, or the determination of any question arising in the administration of the estate or trust. It is in exercise of the right so given that the trustees have asked in the originating notice for answers to the questions that have been set forth. *Prima facie* they have the right to an answer, if the Court has jurisdiction to give it. Every payment that is made out of the general estate pursuant to clause IV (g) of the will reduces the amount of the residue disposed of by clause IV(zn), and to protect themselves against claims by the residuary legatees that the residue has been unduly reduced in amount, the trustees ought, if possible, to obtain the opinion of the Court as to whether "dispositions" or some "dispositions" have validly been declared to be subject to duty. Similarly, if it is known that the Treasurer or the Treasury Department claims that duty, whether on gifts *inter vivos* or on gifts, devises or bequests made by the will, is itself validly made subject to duty, the trustees, before making payment of the duty on duty claimed and so reducing the residue still further, ought to obtain, if possible, an expression of the opinion of the Court as to the validity of that particular claim; and they ought also to ascertain whether, in the opinion of the Court, clause IV(g) of the will directs them to pay such last mentioned duty; and whether the direction to pay duty on the duty is also, by the statute, validly made subject to duty. Indeed, it is difficult to see how the trustees can proceed very far with the administration of the estate until in some manner the questions raised have been settled. But counsel for the Attorney-General and the Treasurer take the preliminary objection that the Court has not in this proceeding the right to pass upon the questions, or all of the questions, submitted. In support of the objection they contend, first, that the Court cannot, without impugning the title of the Crown, declare either that the statute which professes to make the duties payable is invalid, or even that on its true construction it does not profess to make the duties payable; and they say in effect that, except in an action brought by the Attorney-General or the Treasurer or on the

hearing of a petition of right, the declarations cannot be made. They say also that involved in the making of the declarations would be a determination that certain money paid by the trustees and now in the hands of the Treasurer ought to be returned; and that that is one of the reasons why the proceeding for the determination of the questions, if initiated by the trustees, must be by petition of right. Also they say that it would be inconvenient and useless to make the declarations upon this motion, because the declarations would not finally determine all the question as to the amount of succession duty payable, and that there is another procedure provided by The Succession Duty Act, 1939 (1939, 2nd session, c. 1, s. 31) which ought to be followed. These points as to the return of the money, inconvenience, and resort to the statute of 1939 will be discussed later. The first thing to consider is the general question as to the power of the Court, upon originating notice rather than upon the hearing of a petition of right, to pronounce upon the questions asked by the trustees.

The argument of the general question as to the power of the Court upon such a motion involved the citation and discussion by counsel of many authorities, amongst others, *Dyson v. Attorney-General*, [1911] 1 K.B. 410; the report of the judgment pronounced in the same case upon the appeal from the judgment pronounced at the trial, [1912] 1 Ch. 158, and the case dealt with at the same time, *Burghes v. Attorney-General*, [1912] 1 Ch. 173; *Esquimalt and Nanaimo Railway Company v. Wilson et al.*, [1920] A.C. 358, 50 D.L.R. 371, [1919] 3 W.W.R. 961; *Attorney-General for Ontario et al. v. McLean Gold Mines, Limited*, [1927] A.C. 185; *Smith v. Attorney-General for Ontario*, 53 O.L.R. 572, [1923] 4 D.L.R. 1071, affirmed [1924] S.C.R. 331, [1924] 3 D.L.R. 189, 42 C.C.C. 215; *Lovibond v. Grand Trunk Railway Company of Canada et al.*, [1936] 2 All E.R. 495, [1936] 3 D.L.R. 449, 45 C.R.C. 162, [1936] 2 W.W.R. 298.

I do not think that any advantage is to be gained by discussing one by one the points dealt with in the cases that preceded *Lovibond v. Grand Trunk Railway Co.*, because we are not here troubled with any question as to the right of the trustees to bring the Attorney-General before the Court. It occurs constantly in this country, where the legislative powers of Parliament and the Legislatures respectively are defined by The

British North America Act, that in a controversy between subjects in which one of them relies upon a statute, whether of Parliament or of a Legislature, the question of the validity of that statute must be determined. Hence the necessity of the provision in The Judicature Act (R.S.O. 1937, c. 100, s. 32) that "Where in any action or other proceeding, the constitutional validity of any Act or enactment of the Parliament of Canada or of this Legislature is brought in question, the same shall not be adjudged to be invalid until after notice has been given to the Attorney-General for Canada, and the Attorney-General for Ontario." Thus, if Sir Joseph Flavelle's trustees, without having first obtained the opinion and advice of the Court, were to pay out of the general estate duties which The Succession Duty Act professes to impose, and, to a claim made by the residuary legatees were to set up the statute as justifying the payment, it would be quite open to the residuary legatees to reply that the statute was invalid, and the Court would be bound to pass upon the question of validity thus raised. Before it could be decided that the statute relied upon was invalid, the notices to the Attorneys-General provided for by The Judicature Act would have to be given, as they were in this case, but that would not be to make the Attorneys-General parties to the action, but, as it is put by Lord Russell of Killowen in the *Lovibond* case, so that their presence and assistance might be obtained. Now I think that on the present proceeding by originating notice, the power of the Court to pass upon the validity of the legislation arises incidentally and much in the manner in which it would arise in such an action as has been mentioned. The trustees are acting under a will which directs them to pay out of the testator's general estate the succession duties and inheritance and death taxes that may be payable by reason of the testator's death, whether in respect of gifts made by him in his lifetime or in respect of gifts, devises and bequests contained in his will. Succession duties and inheritance and death taxes are payable not because some statute professes to make them payable, but because a statute within the legislative competence of the Legislature by which it was passed makes them payable, and when the trustees are told by the persons interested in the residue that the constitutional validity of the Act professing to impose the duties is disputed, the question of validity is raised just as clearly as it would be raised if the trustees, acting upon an assumption

of the validity of the statute, had disbursed moneys of the estate and had been called upon to justify the disbursement; and I think that there is nothing in any of the cases cited and discussed that indicates that the question so raised by the originating notice is one that may not be decided. The circumstances in which it is necessary to proceed by petition of right are so clearly indicated by the judgment in *Lovibond's* case, [1936] 2 All E.R. 495, [1936] 3 D.L.R. 449, 45 C.R.C. 162, [1936] 2 W.W.R. 298, that, as I have said, I think it unnecessary to discuss the earlier cases in any detail. The junior stocks in that case being in the name of the Minister in trust for the Crown, the orders claimed in paragraph 32(a), (g), (h), and (k) of the statement of claim—that is (a) an order to rectify the stock register, (g) an order directing the railways to rectify the stock register by restoring the name of the plaintiff as the registered owner of certain stock, (h) an order directing the railways to appropriate or acquire certain stocks and to transfer and register the same in the books in the name of the plaintiff as holder thereof, and (k) an order directing the railways to register the plaintiff or cause him to be registered as the holder of certain other stocks—could only be granted by taking stock away from the Crown's trustee, and could not be granted in the action. But the plaintiff's claim by way of damages against the companies, founded upon some alleged breach of duty in removing the name of the plaintiff from the stock register, was not one for the substitution of the plaintiff on the register as owner of stock in the place of some other person and there was no reason why the plaintiff should be prevented from proceeding with it, notwithstanding that his title to any relief might ultimately turn out to depend upon the invalidity of the impeached Acts of Parliament and Orders-in-Council, which statutes and orders had professed to vest the stock in the Crown. From this, in my opinion, it is to be deduced that there is no reason for saying that the trustees in the present case must resort to the procedure by petition of right, even if that procedure would be appropriate: as to which see what was said by the present Chief Justice of Canada in *Tiny Separate School Trustees v. The King*, [1927] S.C.R. 637, at pp. 706-7, and by Newcombe J. at p. 713 (also reported [1927] 4 D.L.R. 857). The point is not mentioned by Viscount Haldane in delivering the judgment of

the Privy Council: [1928] A.C. 363, [1928] 3 D.L.R. 753, [1928] 2 W.W.R. 641.

Two cases in which the Courts in Alberta dealt on an originating notice with questions of the same nature as the questions here raised are *In re Cust* (1915), 8 Alta. L.R. 308, 7 W.W.R. 1286, 29 W.L.R. 716, 21 D.L.R. 366, and *In re Corlet Estate*, [1939] 2 W.W.R. 478, [1939] 4 D.L.R. 111, 6 I.L.R. 173. But these are not of much assistance because, first, the point as to jurisdiction is not referred to, and secondly, there appears to have been express statutory authority for the procedure adopted. *In re Corlet Estate* was a decision on The Succession Duty Act, 1934 (Alta. 1934, c. 17), of which s. 43(2) reads in part, "An action may be brought or a summary application made to the Court to determine any question as to the liability of any person or property for the payment of duty under this Act"; and it may be that *In re Cust* was dealt with under The Succession Duties Act (1914 Alta., c. 5), s. 35 of which read, "A judge shall have jurisdiction upon motion or petition, to determine what property is liable to duty under this Act, and the amount thereof."

In the foregoing general discussion of the jurisdiction of the Court on this motion, no reference has been made to the point already mentioned as taken by counsel for the Attorney-General and the Treasurer that the effect of a decision against the validity of the legislation would involve a declaration of the invalidity of the Treasurer's title to some money already paid to him by the trustees. The answer to that objection appears to be one of fact. A large sum of money was paid by cheque to the Treasurer as security. That money is not the money to which the objection relates. Another sum of \$200,000 was paid, and on the correspondence there is some question as to whether it was an additional security or a payment on account, but even if it is to be treated as a payment on account, it is much less than the sum that, on any possible holding as to the validity or invalidity of parts of the statute, will be payable as duty, and as I understand the facts, no decision that the Court is now asked to render can possibly be equivalent to a decision that this money ought to be returned.

Then as to the question of the convenience or inconvenience of the present procedure, and of the obligation of the trustees to follow the procedure provided by s. 31 of The Succession Duty

Act, 1939. On the question of convenience reference was made to *Lewis v. Green*, [1905] 2 Ch. 340, and *Bombay and Persia Steam Navigation Company, Limited v. MacLay*, [1920] 3 K.B. 402. In the first of those cases, which was an application by originating summons for the determination of a question arising under an instrument, Warrington J. referred to Order LIV. A, r. 4, which reads: "The Court or judge shall not be bound to determine any such question of construction if in their or his opinion it ought not to be determined on originating summons", and went on to say that if the Court should come ultimately to a decision that on the question of construction the applicant was right, no relief could be given: "There are other points which have to be decided. They can only be decided by bringing an action, and in that action it may turn out that, notwithstanding the applicant is right on the questions of construction, he is ultimately found to be wrong"; and in the circumstances he declined to pass upon the question of construction. That does not seem to me to have much to do with the present case in which the procedure adopted appears to me to be a convenient procedure. The *Bombay* case is not, as I read it, helpful on this point but it is of value for Rowlatt J.'s summing up of what was decided in *Dyson's* case, [1911] 1 K.B. 410, [1912] 1 Ch. 158, a case in which he had been one of the counsel. "It was there decided that an action could be brought against the Attorney-General in the name of his office to have it declared that the forms were bad, and that the Attorney-General was not entitled to enforce obedience to them. That is how it was put by Pickford, L.J. in *Guaranty Trust Company of New York v. Hannay & Company*, [1915] 2 K.B. 536, 562, and that adequately describes the case."

S. 31 of The Succession Duty Act, 1939 (1939, 2nd session, c. 1) does establish a procedure by which questions such as are raised on the present motion may be brought before the Court. As to whether that procedure can be followed in connection with Sir Joseph Flavelle's estate, see the statute of 1940, c. 29, s. 23. Counsel were not agreed upon this point, and no present pronouncement upon it appears to be desirable, because whether or not the procedure can be followed in the case of the estate of a person who died before the passing of the Act of 1939, it is a procedure in which the initiative is with the Treasurer. The first step is the serving by the Treasurer of a statement show-

ing the amount of duty, interest, and penalties claimed to be payable, and particulars as to the computation thereof, and no such statement has been served. There has been delivered to the trustees by the Treasury Department what is called a tentative statement of succession duty payable, but counsel are agreed that that tentative statement is not the statement referred to in s. 31. Therefore, the steps which, under the section, are to be taken if the objections to the statement are to be brought before the Court for adjudication, cannot be taken, and the suggestion that the procedure by way of originating notice ought not to be followed because another procedure has been prescribed by statute cannot prevail.

The charging section of the Ontario Act as amended reads as follows:

“9. At the date of the death of any person,—

“(a) all property situate in Ontario passing on the death of such person, whether such person was at the time of his death domiciled in Ontario or elsewhere;

“(b) every transmission within Ontario owing to the death of any person domiciled therein of personal property locally situate outside Ontario;

“(c) every disposition of any property (other than realty situate outside Ontario) made within Ontario by any such person during his lifetime, on or after the 1st day of July, 1892;

“(d) every person to whom a disposition of any personal property (other than the property mentioned in clause *g* of section 10) was made after the date of the coming into force of this Act by the deceased in his lifetime outside Ontario, in respect of such personal property, when such deceased person was domiciled within Ontario at the time of such disposition and at the time of his death, and when the person to whom such disposition was made was resident or domiciled within Ontario at the time of such disposition and at the time of the death of the deceased person;

“shall be subject to duty.”

By s. 10(*g*) the property passing on the death of the deceased (and by s. 9(*a*) declared to be subject to duty) is declared to include for all purposes of the Act:—

“(g) any property in respect of which a disposition was made by the deceased person outside Ontario during his lifetime, where such deceased person was domiciled in Ontario at the time

of the disposition and at the date of his death and which property was situate within Ontario and owned by the person to whom such disposition was made at the date of the death of such deceased person, or any other property into which such property has become directly converted, or which, exclusive of income, has been derived therefrom, when such other property was situate within Ontario and owned by the person to whom such disposition was made, at the date of the death of the deceased person;”

The first Succession Duty Act passed in Ontario was The Succession Duty Act, 1892 (statutes of 1892, c. 6) which went into effect as respects the estates of persons dying on or after July 1st, 1892. The subject-matters of taxation under that Act were property passing and certain property disposed of by the deceased person in his lifetime: see the review of the legislation by Magee J.A. in his dissenting judgment in *Wilder's case—Attorney-General for Ontario v. National Trust Co. Ltd.*, [1931] O.R. 122, [1931] 2 D.L.R. 712. Later, instead of enacting directly that certain property of which the deceased had disposed in his lifetime should be subject to duty, the practice was adopted of enacting that the property passing should be deemed to include for all purposes of the Act certain property that had so been disposed of, and by the statute of 1914, c. 10, s. 5 (amending R.S.O. 1914, c. 24, s. 7(2)(b)) the property passing was declared to include any property taken under a disposition operating or purporting to operate as an immediate gift *inter vivos* made since the 1st day of July 1892. The list of properties not actually passing but deemed to pass upon the death was extended from time to time, and by the time of the consolidation of the Acts by The Succession Duty Act, 1934 (1934, c. 55) it was quite large, but still what the Act professed to make subject to duty was all property situate in Ontario and any income therefrom passing on the death and every transmission within Ontario, owing to the death of a person domiciled therein, of personal property locally situate outside Ontario.

By The Succession Duty Amendment Act, 1937 (1937, c. 3, s. 7), s. 6 of The Succession Duty Act of 1934 was repealed and the section that is now s. 9 of the Act applicable in the present case was substituted. From the passing of this Act the only property disposed of by the deceased person in his lifetime that was declared to pass on his death was (s. 10(g)) certain property

in Ontario of which a disposition had been made by the deceased person outside Ontario; so that since 1937 what is declared to be subject to duty is (1) *property* in Ontario passing or deemed to pass on the death, (2) *transmissions* in Ontario owing to the death of any person domiciled therein of personal property locally situate outside Ontario, (3) every *disposition* of any property (other than realty situate outside Ontario) made within Ontario by the deceased person during his lifetime on or after July 1, 1892, and (4) every *person* to whom a disposition of personal property (except the property declared by s. 10(g) to be deemed to pass on the death) was made outside Ontario after the date of the coming into force of "this" Act, provided the disponent was domiciled and the disponent (if for convenience I may use those terms of Scots law) was resident or domiciled in Ontario at the relevant dates. We are not concerned in this case with any property disposed of outside Ontario or with transmissions within Ontario of personal property locally situate outside Ontario, or with persons to whom dispositions were made by the testator during his lifetime outside Ontario, because the papers produced do not indicate that the testator in his lifetime disposed outside Ontario of any property or that there was on his death any transmission in Ontario of personal property locally situate outside Ontario. The inquiry, then, so far as s. 9 is concerned, has to do only with dispositions made within Ontario on or after July 1, 1892 (s. 9(c)).

Section 9(c) is attacked on several grounds. The first of these to be considered is the ground that the subject-matter of the tax is dispositions made before the death of the testator and at a time when there was no law making them subject to duty; that such dispositions (whatever may be the fact as to the property disposed of) have no existence either in Ontario or elsewhere at the time of the death; and therefore that the enactment that they shall be subject to duty at the date of the death of the testator cannot be justified as taxation within the Province.

Counsel for the Attorney-General and the Treasurer, reading the Act as a whole, and referring in particular to s. 16—which fixes the rates at which duty shall be levied and paid, (a) on property passing on the death and situate in Ontario at such time, (b) on all dutiable transmissions, (c) on all dutiable dispositions and (d) on all persons mentioned in s. 9(d)—, s. 19

—which declares in the words introduced in 1937 that every person in whose favour a disposition is made shall be liable for the duty, if any, in respect of the disposition made to him—and s. 23 —which declares that the duty imposed by the Act, unless otherwise therein provided, shall be due at the date of the decease, and that where such duty is levied in respect of a disposition, wherever made, of property in Ontario, the duty shall be and remain a first lien and charge upon the *property* in respect of which it is payable, until paid—, contend that, notwithstanding the form of s. 9(c), it is persons and not dispositions that are made subject to duty, and that upon the true reading of the Act the persons made subject to duty are only persons resident or domiciled within Ontario at the time of the disposition and at the time of the death of the deceased person.

By The Income Tax Act of Alberta, 1932, c. 5, it was enacted (s. 8(1)) that there should be assessed, levied and paid upon the income during the preceding year of every person residing or ordinarily resident in the Province of Alberta during such year a tax upon the amount of his income. In *Kerr v. Superintendent of Income Tax and Attorney-General for Alberta*, [1942] S.C.R. 435, [1942] 4 D.L.R. 289, this tax was found by the Supreme Court of Canada, upon a reading of the whole Act, to be not a tax on the income itself but a tax on the person receiving the income who was found within the Province. Therefore, the fact that part of the income was earned outside the Province was unimportant; but I am unable, even with the assistance of that case, to give to s. 9(c) of the Act here in question the reading for which counsel for the Attorney-General and the Treasurer contend.

The change from s. 6 of the statute of 1934—which, as has been stated already, declared that all property situate in Ontario passing on the death of any person should be subject to duty, and that property passing on the death of the deceased should be deemed to include any property taken under a disposition made since July 1, 1892—to the statute of 1937—which professed to make subject to duty every disposition of any property (other than realty situate outside Ontario) made within Ontario by any “such” person—was, as the whole of the Act of 1937 shows, made deliberately. It was made not very long after the Judicial Committee of the Privy Council in *Provincial Treasurer of Alberta et al. v. Kerr et al.*, [1933] A.C.

710, [1933] 4 D.L.R. 81, [1933] 3 W.W.R. 38, had clarified the distinction to be drawn, in the consideration of provincial succession duty Acts, between transmissions and the property transmitted. Apparently it was made in the endeavour to take advantage of a similar distinction between a disposition and the property disposed of; but whatever the motive for the change may have been, the distinction between the disposition and the property disposed of as the subject-matter of taxation is made very clear; property, transmissions, dispositions and persons, are severally declared to be subject to duty; by s. 12(c) the provisions of s. 9 are to apply notwithstanding that the property in respect of which there is a disposition may not be in existence at the date of the death or owned at that date by the person to whom the disposition was made; and in s. 19(1) the donee is declared to be liable for the duty, if any, in respect of the disposition. My opinion upon the reading of all of these sections is that the subject-matter of the taxation imposed by the charging s. 9(c) is the disposition and not the property or the donee, and that, as in *Provincial Treasurer of Alberta v. Kerr*, the sections which profess to provide a particular liability for payment of the tax do not affect the question as to the validity of the tax. In *Kerr v. Superintendent of Income Tax and the Attorney-General for Alberta*, Kerwin J., with whom Taschereau and Gillanders JJ. concurred, has drawn attention to the fact that Lord Thankerton's statement in *Provincial Treasurer of Alberta v. Kerr*, that the identification of the subject-matter of the tax is naturally to be found in the charging section of the statute, was made in the course of the consideration of the question whether the tax was imposed on property or a transmission. The fact that the statement was made in that connection led Kerwin J. to the conclusion that it afforded no assistance in the determination of the question with which the Supreme Court of Canada had to deal, but it is to my mind of prime importance in connection with the point now under discussion. I think, as has been stated already, that in considering the validity of the taxation on or in respect of dispositions under the amendment of 1937 the proper course, to whatever result it may lead, is to begin by finding in the charging section the subject-matter of the tax; and that subject-matter I find to be the disposition, thus going with Mr. Tilley on the first stage of his argument.

Having made the point that the disposition was the subject-matter of the tax, Mr. Tilley proceeded to argue that the disposition, being non-existent at the time of the testator's death, could not be said to be within Ontario, and therefore that the enactment that it should be subject to duty could not be said to be taxation within Ontario. If a transmission within the Province can be (as, undoubtedly, upon the authorities, it can be) the subject-matter of provincial taxation, there seems to be no reason for saying that a disposition made within the Province cannot be such a subject-matter. Indeed, it was not contended that it would be beyond the power of the Legislature to make a disposition bear a tax at the time at which it was made; what was attacked was the validity of the attempt to make it the subject-matter of taxation at the death of the disponent. The idea of the continued existence of the disposition is not easy to grasp, but it seems to have been the idea of the draughtsman of s. 9(c) of the Act of 1937. Thus in s. 19 he declares to be liable for the duty a person in whose favour a disposition is made, and I do not think that by the use of the present tense he intends to make liable only a person in whose favour a disposition is made after the effective date of the Act of 1937. He appears to treat a disposition, whenever made after 1892 by a person who dies after the effective date of the Act of 1937, as something that can be spoken of in the present tense. The idea is a new one, and the declaration that a notional thing like a disposition shall be subject to duty may lead to practical difficulties, or may, in many instances, be ineffective as a revenue-producing measure; for instance, a disposition cannot be seized or sold for non-payment of the duty to which it is declared to be subject, and at the death of the disponent the disponent may be no longer living, or if living, may not be domiciled or even resident in the taxing Province. Nevertheless it seems to be difficult to say that because the disposition had its effect once and for all at the time at which it was made, and because in that sense it has no longer any situs within the Province, there can be applied in respect of it such a statement as was made by Anglin J. (as he then was) in *The King v. Cotton et al.* (1912), 45 S.C.R. 469 at 536, 1 D.L.R. 398, 10 E.L.R. 461, and approved by Lord Thankerton in *Provincial Treasurer of Alberta et al. v. Kerr et al.*, [1933] A.C. 710 at 718, [1933] 4 D.L.R. 81, [1933] 3 W.W.R. 38. When Anglin J. said that in order that a provincial tax should be valid

under The British North America Act the subject of taxation must be within the Province, he was speaking of physical property and its situs; he was not thinking of or discussing any question as to whether a transaction that had taken place within the Province could, at a later time, be made subject to duty in the Province, and his statement, as I understand it, can have no bearing upon the point now under consideration. Theoretically, if the notional thing, the disposition, is in the Province originally, and therefore is a permissible subject-matter of provincial taxation, the Province does not go beyond its borders in making it the subject-matter of taxation on the death of the disponent; and so I think that whatever may be said as to other grounds of attack upon the validity of s. 9(c) of the Ontario Act, it cannot be said that it is invalid just because the thing which it declares to be subject to duty is not in the Province. So I cannot take the second step taken by Mr. Tilley in this particular part of his argument.

Another reason advanced for saying that s. 9(c) was beyond the provincial power was that the imposition of the duties was not taxation in the sense in which the word is used in s. 92(2) of The British North America Act. It was said that real taxation involves a proportional levy, proportional, for instance, to the benefit that the person taxed has received (as in local improvement taxes) or to ability to pay; that there must be certainty; that there must be generality of application, and not, as in this case, an imposition of liability upon those disponees who happen to outlive the disponent, while those who died in his lifetime, or their estates, go scot-free; and in connection with the suggestion that this tax is not proportionate to the benefit received by the disponent, attention was directed to s. 12 which makes the value of the disposition depend (subject to certain provisos) upon the market value, at the date of the death of the disponent, of the property in respect of which the disposition was made. It was pointed out that property, for instance shares of stock which had little value at the time of the disposition, may through the disponent's skilful management become very valuable by the time of the death of the disponent, and that the disponent, if he is made to pay the duty, will, in comparison with a disponent whose property has not increased in value, be treated quite unfairly. It was said that succession duty properly so-called is good taxation because it is upon a succession which takes place under the protection

of the law, the class taxed being composed of those who succeed; but that when you come to disponees you have no class at all of persons who have something in common; that to enact that every disponent shall pay a tax, no matter how computed, is one thing, but that to say that some disponees shall pay a tax, making disponees from one disponent, or disponees who outlive the disponent, liable, but leaving disponees from another disponent, or (the estates of) disponees who predecease their disponent, free, is not taxation but arbitrary confiscation. Instances were given of great hardship to which particular disponees from Sir Joseph Flavelle would be subjected (save in so far as relieved by the testator's direction to the trustees to pay the duties) if the contention of the Treasurer as to the validity and effect of the Act is adopted. One of the cases mentioned was the case of a beneficiary to whom the testator in his lifetime had made periodical gifts of comparatively small sums of money and for whom in his will he had provided corresponding periodical payments by the trustees. Capitalizing the future payments to be made by the trustees, and computing the duty professed to be imposed in respect of the capital sum and in respect of the dispositions, the result is that this beneficiary is (according to the contention) indebted to the Treasurer in an amount considerably in excess of the value of the legacy. It was admitted that this kind of hardship is not in itself sufficient to establish the invalidity of the statute, but it was said that the possibility that the Act would work such hardship pointed to the conclusion that the duties professed to be made payable are not taxes but measures of confiscation. Reference was made to Cooley on Taxation, 4th ed., Vol. 2, Art. 539, commencing on page 1187, and it was said that the statement by White J. in *Receiver-General of New Brunswick v. Rosborough* (1915), 24 D.L.R. 354, 368, 43 N.B.R. 258 that "While the legislature can only tax property situate within the province, it can fix the rate of any tax which it is empowered to impose on any basis or at any figure it may see fit", was too sweeping.

No cases very directly supporting the argument that duties such as those professed to be imposed by the statute are not authorized by the legislative power in respect of taxation were cited by counsel. *Dow et al. v. Black et al.* (1875), L.R. 6 P.C. 272, was cited because of the discussion in the judgment of the right of the Province to tax a particular locality in respect of

a particular benefit. *Forbes v. Attorney-General for Manitoba*, [1937] A.C. 260, [1937] 1 D.L.R. 289, [1937] 1 W.W.R. 167, was referred to because of Lord Macmillan's statement (p. 269) that the tax there in question was not in any way discriminatory. It was suggested that if it had been found to be discriminatory it might have been held not to be a tax. *Shannon et al. v. Lower Mainland Dairy Products Board*, [1938] A.C. 708, [1938] 4 D.L.R. 81, [1938] 2 W.W.R. 604, was discussed, but not as a case directly in point. *City of Montreal v. Harbour Commissioners of Montreal*, [1926] A.C. 299, [1926] 1 D.L.R. 840, [1926] 1 W.W.R. 398, 47 Que. K.B. 163, was mentioned with particular reference to p. 313. *Attorney-General for Alberta v. Attorney-General for Canada et al.*, [1939] A.C. 117, [1938] 4 D.L.R. 433, [1938] 3 W.W.R. 337, was mentioned as a case in which the Privy Council decided, on a consideration of the object of the Taxation of Banks Bill and of its effect if it became operative in the Province, that the proposed taxation was not in any true sense taxation "in order to the raising of a revenue for provincial purposes", and for the observations (pp. 133-4) on the decision in *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575, including the statement that it was "important to note that the taxes [in the *Lambe* case] were not directed against a particular class of business or employment, but were imposed within the Province on every bank, insurance company, incorporated company carrying on any labour, trade or business in the Province, and on a number of other specified companies."

As has been stated, none of the cases already mentioned or of the other cases that were discussed is a direct authority for applying to a statute, for the purpose of ascertaining whether it is or is not in truth a taxing Act, any of the tests suggested by counsel in the present case. On the other hand it is to be observed that in *Lambe's* case it was argued by counsel for the banks, (p. 578) that "One of the principal characteristics of a direct tax is its generality—falling on all persons alike", and that Lord Hobhouse said in reference to this: "It is said that Mill adds a term—that to be strictly direct a tax must be general; and this condition was much pressed at the Bar. Their Lordships have not thought it necessary to examine Mill's works for the purpose of ascertaining precisely what he does say on this point; nor would they presume to say whether for economi-

cal purposes such a condition is sound or unsound; but they have no hesitation in rejecting it for legal purposes."

It may be that some of the inequalities and hardships that may follow upon the application of the Ontario statute are inseparable from any statute which has for one of its objects the frustration of any attempt of the owners of property to free their families of the obligation to pay succession duties, or death taxes, or whatever they may be called, by disposing of the property *inter vivos*, and especially may this be so in the case of a statute which, to use the words used by Lord Hanworth M.R. in *Attorney-General for Ontario v. National Trust Company, Limited*, [1931] A.C. 818, 40 O.W.N. 499, [1931] 3 D.L.R. 689, [1931] 3 W.W.R. 298, "looks back over a span of more than a full generation of years"; and in my opinion there is no warrant in any of the decided cases for saying that because of the existence of the inequalities, uncertainties, and hardships to which attention has been directed, the statute as amended in 1937 is beyond the legislative power of the Province. Indeed, I think it can be said that the general trend of the authorities is to ignore the economists' discussion of the question as to what a tax ought to be, and to treat as valid taxation, within the meaning of s. 92(2) of The British North America Act, measures adopted by the Province, even if, because of the method of computation of the amounts payable or for other reasons, they are of unequal or even unfair application, provided, of course, that they stand the tests of directness and do not transgress the territorial limitation.

Another attack upon the constitutional validity of the Act calls attention to the sweeping nature of the charging section and the sections which provide for the collection of the duty to which, *inter alia*, the dispositions made within Ontario are declared to be subject. In part s. 9(c) is somewhat difficult to construe: it is hard to say who is meant by the expression "any such person." Section 9 begins, "At the date of the death of any person, —"; then in clause (a) it mentions property passing on the death of "such" person, whether such person was at the time of his death domiciled in Ontario or elsewhere; in (b) it mentions every transmission within Ontario owing to the death "of any person domiciled therein" of personal property locally situate outside Ontario; in (c) every disposition of any property (other than realty situate outside Ontario) made within On-

tario by any "such" person; and in (d) every person to whom a disposition of personal property (other than the property deemed to pass on the death) was made outside Ontario when the deceased person was domiciled and the disponent was resident or domiciled within Ontario at the relevant times; and then it closes with the words "shall be subject to duty." The words "any such person" in clause (c) may refer back to the words "any person domiciled" within Ontario in clause (b) or they may relate back to the opening words of the section, "At the date of the death of any person". To construe them as relating to the person domiciled in Ontario, who is the person immediately before mentioned, would be natural but for the fact of the use of the similar expression in (a) where obviously, and as, indeed, is stated expressly, they mean any person wherever domiciled. But it is not clear to me that very much depends on ascertaining which of the readings is correct; for even if (c) professes to make subject to duty a disposition made within Ontario by a person not therein domiciled, I think that, for the reasons already given in connection with the discussion of the question whether a past disposition is something that can be made subject to duty, the clause is not, for that reason alone, to be held to be invalid. In the course of the argument it was suggested that even if s. 9(c) professes to touch dispositions made within Ontario by persons not domiciled therein, it ought to be read as applying only to dispositions made by persons so domiciled to others also so domiciled or ordinarily resident. This suggestion was based in part upon what Lord Phillimore said in *Burland et al. v. The King; Alleyn et al. v. Barthe*, [1922] 1 A.C. 215 at 228. But what Lord Phillimore was there discussing was the Quebec statute, 4 Geo. V, c. 10 (art. 1387b) by which it was enacted that "All transmissions within the Province, owing to the death of a person domiciled therein, of moveable property locally situate outside the Province at the time of such death, shall be liable to the following taxes . . . ", and (art. 1387(g)) that "Every person to whom as heir, universal legatee, legatee by general or particular title, or donee under a gift in contemplation of death, moveable property outside the Province is transmitted, is personally liable for the duties in respect of such property". He said that the conditions stated in the statute upon which taxation attaches to property outside the Province are two: (1) that the transmission must be within the Province, and

(2) that it must be due to the death of a person domiciled within the Province, and he went on to say that the first of these conditions could only be satisfied if the person to whom the property was transmitted was either domiciled or ordinarily resident within the Province; “for in the connection in which the words are found no other meaning can be attached to the words ‘within the Province’ which modify and limit the word ‘transmission’”. But a transmission takes place by reason of the relevant law, whereas a disposition is the act of the parties, and my opinion is that what Lord Phillimore said about transmissions is not applicable to dispositions. In my opinion a disposition is within the Province if, at the time at which it is made, the disponent and the disponent, wherever domiciled or ordinarily resident, are there present; and that is my reason for thinking that even if s. 9(c) professes to make subject to duty a disposition made within Ontario by a person not therein domiciled, it is not, for that reason alone, to be held to be beyond the provincial legislative power.

The making of a notional thing like a disposition subject to duty does not advance the Province very far in the effort to collect revenue: the real effectiveness of the attempt must depend upon the part of the enactment which renders some one liable for the payment of the duty to which the disposition is made subject. Therefore, in the present case (assuming the correctness of my holding that s. 9(c) is valid) the important sections appear to be ss. 16 and 19. By s. 16(1) it is enacted that, subject to provisions as to exemption from duty, duty shall be levied and paid whether the deceased was domiciled at the time of his death in Ontario or elsewhere (a) on all property passing on the death and situate in Ontario at such time; (b) on all dutiable transmissions; (c) on all *dutiable dispositions*; and (d) on all persons mentioned in s. 9(d); according to the dutiable value as in the statute provided, at certain rates. These rates are set out in s. 16(1)(i) to (v). They depend in part upon the aggregate value of the estate, and in the case of dispositions, upon the relationship or lack of relationship of the disponent to the deceased person. Then, having thus in s. 16, enacted that the duty shall be “levied and paid”, the statute goes on, in s. 19(1) to say what person shall be liable. The part of the last-mentioned subsection that seems to be relevant to the payment of the duty directed by s. 16 to be levied on all “dutiable dispositions” is as follows:— “every person . . . in whose favour a disposition is

made shall . . . be liable for the duty, if any, in respect of any . . . disposition to him," and the real question upon this branch of the case appears to me to be the question as to the meaning and validity of the words just quoted. The chief question as to the meaning is, I think, raised by the use of the present tense in the expression "in whose favour a disposition is made". A taxing statute is, of course, to be read strictly; the Crown fails if the case is not brought within the words of the statute interpreted according to their natural meaning; and the intention to impose taxation or a duty must be shown by clear and unambiguous language, and it cannot be inferred from ambiguous words: see the judgment of Grant J.A. in *Attorney-General for Ontario v. National Trust Co. Ltd.*, [1931] O.R. 122, [1931] 2 D.L.R. 712, in which the authorities for these statements are set out, and also *Attorney-General v. Milne et al.*, [1914] A.C. 765. But notwithstanding this general principle of construction, and the fact that as a rule statutes are intended to speak from their effective dates, and the fact that at first glance the words "is made" might seem to mean "is hereafter made", I think that to construe s. 19(1) as imposing a liability only upon persons to whom dispositions are made after the effective date of the statute of 1937, by which the words "in respect of any disposition to him" were introduced, would be to read it too narrowly. Its true meaning, I think, can be found only when it is read with ss. 9 and 16. The theory of the draughtsman, as has been stated already, appears to have been that any disposition made after July 1, 1892, could, at the date of the death of the donor, be made subject to duty. Having in s. 9(c) declared the disposition to be subject to duty and having in s. 16(1) directed the duty to be levied and paid, he proceeded in s. 19(1) to declare the liability of the donee; and when in the last-mentioned subsection he spoke of the person to whom the disposition is made, he appears to me to have been saying in effect that when it is necessary to ascertain the person by whom, pursuant to s. 16, the duty is to be paid, the disposition that is subject to duty must be looked at, and when by looking at it, you ascertain in whose favour it is made, you have found the person who is liable for the duty in respect of it. Some such form of expression as "every person to whom a disposition has been made on or after July 1, 1892, or shall hereafter be made" might have been better; but reading together the three sections that have been

mentioned, it appears to me that s. 19(1) is expressed with sufficient clarity and that it does purport to impose on every person to whom after July 1, 1892, and before the effective date of the Act of 1937, as well as on every person to whom a disposition is made after that date, a liability to pay the duty, if any, in respect of it.

The other question of the interpretation of s. 19(1), in so far as it has to do with dispositions, relates to the expression "the duty, if any, in respect of any . . . disposition". It is less difficult. The words of s. 9 are that the disposition shall be subject to duty; s. 16 says that duty shall be levied and paid on all dutiable dispositions; and that duty that is to be levied and paid is a duty *in respect of* the disposition "on" which it is to be paid.

Another question as to the interpretation of s. 19, in so far as it relates to liability for duty upon property passing or in respect of transmissions, will perhaps be discussed more conveniently when the question numbered 2(a) in the originating notice is under consideration.

Section 19 is not, in words, restricted to professing to impose liability upon heirs, legatees, persons to whom property passes, or persons in whose favour a disposition is made who are, at the time of the death of the deceased person, domiciled or resident in Ontario. Of course it must be ineffective as regards such of those persons as are not subject to the legislative jurisdiction of the Legislature of Ontario, and it was suggested that because it was not, in words, made applicable only to persons who are so subject, it was invalid *in toto*. This suggestion is, in my opinion, completely met by the decision in *Macleod v. Attorney-General for New South Wales*, [1891] A.C. 455. See also *Blackwood v. The Queen* (1882), 8 App. Cas. 82. The question is not like the question as to s. 508C of The Criminal Code that arose in *Attorney-General for Ontario v. Reciprocal Insurers et al.*, [1924] A.C. 328, [1924] 1 D.L.R. 789, 41 C.C.C. 336, [1924] 2 W.W.R. 397, or the question that arose in *Attorney-General for British Columbia v. Attorney-General for Canada et al.* (Natural Products Marketing Act Case), [1937] A.C. 377, [1937] 1 D.L.R. 691, 67 C.C.C. 337, [1937] 1 W.W.R. 328. S. 26 of the statute under consideration in the last mentioned case was in these terms: "If it be found that Parliament has exceeded its powers in the enactment of one or more of the provisions of this Act, none of the other or remaining provisions of the Act shall therefore be

held to be inoperative or *ultra vires*, but the latter provisions shall stand as if they had been originally enacted as separate and independent enactments and as the only provisions of the Act; the intention of Parliament being to give independent effect to the extent of its powers to every enactment and provision in this Act contained." Nevertheless, the whole texture of the Act being found to be inextricably interwoven, and it being impossible to contemplate certain provisions as existing independently of other provisions which were *ultra vires*, and it following that there were no separate and independent enactments to which s. 26 could give a real existence, it was held that, the main legislation being invalid as being in pith and substance an encroachment upon the provincial rights, the sections referred to must fall with it as being in part merely ancillary to it. If my opinion, already expressed, as to the validity of s. 9(c) of the Act now under consideration is correct, it cannot be said the relevant parts of s. 19(1) are merely ancillary to an Act which in its main purpose is *ultra vires* of the provincial Legislature, or that there is any other reason for treating them as intended to impose liability upon any person who at the time of the death of the disposer was not subject to the legislative jurisdiction of the Province.

Question 2(a) is: "Is succession duty payable under said paragraph IV(g), whether on gifts inter vivos or on gifts, devises or bequests by the will and codicil itself a dutiable gift or legacy?"

In many cases it has been held in effect that a provision in a will for the payment of a duty out of the testator's estate is in effect a legacy of the amount of the duty. Probably the earliest of such cases, and one that is still cited very frequently, is *Noel et al. v. Lord Henley et al.* (1819), 7 Price 241, 146 E.R. 960. In that case the contest was whether the duty should be paid out of the real estate of the testator or out of the personal estate, and Lord Chief Baron Richards said, "The legacy duty is a charge upon the legacy, not upon the estate; but where the legacy is given free of duty, it is an increase of the legacy itself, and ought therefore to be paid out of the same fund." Another early case is *The Lord Advocate (on behalf of the Commissioners of Inland Revenue) v. Taylor et al.* (1884), 21 Sc. L.R. 709. It was a case of insufficiency of assets. The trustees paid duty on what was available for legacies after deducting the duty itself,

but the Crown maintained that the duty ought to have been calculated on the whole amount available, and therefore that legacy duty on the sum deducted for legacy duty was still payable. It was held that the principle contended for by the Crown was right. The discussion of the question in the judgment was much fuller than in *Noel et al. v. Lord Henley et al.* Much of it had to do with the interpretation of s. 21 of The Legacy Duty Act, 1796 (36 Geo. III, c. 52), the text of which Act is in Hanson's Death Duties, 8th ed., pp. 301 *et seq.*, but the principle upon which the Court proceeded in holding that the provision for payment of the duties was itself a legacy is very fully stated. Thus, the Lord President (Inglis) said, p. 713, "... there can be very little doubt that but for this enactment [s. 21], in every case where a legacy is given free of legacy-duty by the will of the testator, and the executry estate can afford to relieve, and does relieve, the legatee of the amount of the duty by paying the duty out of the executry estate that portion of the executry estate so applied will itself be subject to legacy-duty." In *Farrer v. St. Catharine's College, Cambridge* (1873), L.R. 16 Eq. 19, which again was a case of deficiency of assets, Lord Selborne L.C. said "that a gift of legacy duty on a specific or pecuniary legacy was a common pecuniary legacy for the benefit of the specific legatee in the one case, and of the pecuniary legatee in the other. . . . The value of the specific legacies must, therefore, be ascertained, and the amounts of legacy duty payable thereon calculated, and such amounts must be treated as pecuniary legacies, and abate accordingly." These three cases were cited by Farwell J. in *In re Turnbull, Skipper v. Wade*, [1905] 1 Ch. 726, and the Scottish case and the statement by Richards L.C.B. in *Noel et al. v. Lord Henley et al.* were adopted. One of the most modern of the cases is *In re Anderson Estate; Canada Permanent Trust Company v. McAdam et al.*, 22 Sask. L.R. 610, [1928] 2 W.W.R. 365, [1928] 4 D.L.R. 51, a decision of the Court of Appeal in Saskatchewan. Turgeon J.A., in whose judgment Haultain C.J.S., McKay J.A. and Mackenzie J.A. concurred, pointed out that, as the Attorney-General was not a party to the proceedings or represented upon the argument, the question as to whether duty on the duty was payable could not be decided. He then went on to decide what was really in issue, namely, the validity and effect of a clause in the will providing for the payment of duties, and in that

connection he said, "It follows then that this will must be so construed as to make each one of the legatees referred to in par. 37 the recipient of two legacies: one for the specified sum allotted to him and one for the amount of the duty payable upon that sum." Martin J.A. used this language, "The gift of succession duty, therefore, is a second legacy, and, just as in the case of the main legacy, it is payable out of the general estate, or out of some fund designated for that purpose."

These cases warrant the statement that the provision by clause IV(g) of the will for indemnity against liability for duties is properly described as a legacy; but they do not settle the question whether it is a dutiable legacy.

In England and in Scotland the direction to the executors to pay the duties, being a legacy, was, as I understand the cases, subject to the legacy duty imposed by The Legacy Duty Act, 1796. By s. 2 of that Act (Hanson, p. 302) it was enacted that "upon every legacy, specific or pecuniary, or of any other description, . . . given by any will or testamentary instrument . . . there shall be raised, levied, collected, and paid . . . the several duties, after the rates, and in the manner" set out in the section. But the Ontario Act applicable in the present case does not impose legacy duties properly so called: compare the New Brunswick statute of 1896, as amended in 1897 and consolidated in 1903, and see Lord Robson's statement regarding it in *The King v. Lovitt et al.*, [1912] A.C. 212, 10 E.L.R. 156, (quoted by Hudson J. in *In re Jost Estate*, [1942] S.C.R. 54, 70, [1942] 1 D.L.R. 81); and the question is whether the Ontario Act imposes a duty in respect of such a direction as is contained in clause IV(g) of the will. S. 9 makes property situate in Ontario passing on the death, transmissions, certain dispositions, and certain persons, subject to duty; by s. 16 duty shall be levied and paid on such property, transmissions, dispositions and persons; and by s. 19 certain persons are declared to be liable for the duties in s. 19(1) mentioned. The case then as regards the duty referred to in Question 2(a) seems to depend largely upon the meaning and effect of s. 19(1).

The words of that subsection that seem to impose liability for the duty, if any, in respect of dispositions have been discussed; the words applicable in the case of other duties appear to be these: "Every heir, legatee, devisee or donee, and every person to whom property passes for any beneficial interest in posses-

sion or expectancy . . . shall be liable for the duty upon so much of the property as so passes to him and which is dutiable in Ontario according to the provisions of this Act". Mr. Tilley contended that, as the only liability expressed in the words quoted was a liability for duty upon property dutiable in Ontario and passing on the death, liability in respect of property devised or bequeathed was created only in the case of property devised or bequeathed specifically. He said that the money that was paid in satisfaction of a pecuniary legacy payable out of the proceeds of the conversion of the testator's property into cash could not be said to be property passing. I cannot quite follow that argument. All that the Act says about the meaning of the word "passing" is in ss. 1(f) and 10. In s. 1(f) "passing on the death" is declared to mean passing either immediately or after an interval, either certainly or contingently, and either originally or by way of substitutive limitation; and by s. 10 "property passing on the death" is to be deemed to include certain specified property. These two sections are not very helpful on this particular point, but my opinion is that property of the testator does pass to a pecuniary legatee even when it does not reach him in the form in which it existed at the time of the testator's death. There were not cited, and I have not discovered, cases that can really be said to establish the accuracy of this interpretation, but, as it appears to me to be the reasonable one, I adopt it when proceeding to discuss whether liability for duty in respect of the indemnity provided by clause IV(g) of the will is imposed on the several persons mentioned in the subsection.

The use of the word "so" in the expression "as so passes to him" is puzzling. Passing has not theretofore been referred to in the subsection except in the words "every person to whom property passes for any beneficial interest in possession or expectancy", and a strictly grammatical reading might therefore lead to the belief that no one is declared to be liable for duty except the person to whom property passes for a beneficial interest, and to the treating of the heir, legatee, devisee and donee, as such, as persons upon whom no liability is expressly imposed. But the heir, legatee, devisee and donee are mentioned for some purpose, and some meaning must, if possible, be attached to the mention of them. Therefore, I think that the subsection may properly be construed as if it read, "Every heir,

legatee, devisee, donee, or other person to whom property passes for any beneficial interest in possession or expectancy or in whose favour a disposition is made shall be liable for the duty upon so much of the property as so passes to him and which is dutiable in Ontario according to the provisions of this Act"—the property passing to the person in whose favour a disposition is made being, upon that reading, the property mentioned in s. 10(g) and deemed to pass. That is the reading most favourable to the Treasury, but even upon it I cannot find a declaration that any person is liable for duty upon the money that by clause IV(g) of the will is directed to be paid in respect of succession duties. I think that Mr. Tilley was right in saying that if that money passes at all, it passes, not to the person who, by reason of its payment, is relieved of liability for duty, but to the Treasury, and that by s. 4(c) no duty is leviable on it. The money never reaches or comes under the control of the beneficiary. The direction to the executors to pay it is, on the cases, a legacy to him, but to repeat, there is no legacy duty under the Ontario statute and the only liability that is cast upon any person by s. 19(1) is a liability for the duty upon so much of the property as passes to him and is dutiable in Ontario according to the provisions of the Act. For a discussion of the meaning of the word "passes" see the recent judgment of Plaxton J. in *Re Dunn Estate; Fennell et al. v. The Treasurer of Ontario*, [1942] O.R. 635, [1943] 1 D.L.R. 92.

Under the Act, what has to pass, if personal liability for the duty payable upon its passing is to arise, is dutiable property. "Property", by s. 1(g), "shall include money and real and personal property of every description and income therefrom and every estate and interest in such property and income." But counsel did not suggest, and I do not think, that the fact that every "interest" in money or other property is itself "property" is of importance in considering whether, under s. 19(1), there is liability in respect of the indemnity provided by clause IV(g) of the will. I do not think that, if the money by that clause directed to be paid is not itself dutiable property passing, it can be said that any "estate or interest" in that money passes to any person mentioned in s. 19(1) and that he, therefore, is declared to be liable for duty upon or in respect of such estate or interest under the name of "property." "Property passing" is by s. 10 declared to include whatever is mentioned in any of

the items "(a)" to "(h)". If this list is exclusive, neither the money by clause IV(g) of the will directed to be paid nor any estate or interest in such money is property passing. On the other hand, if, as I think, there is no reason for deeming it to be exclusive, s. 10 is of no assistance in the present discussion. Therefore, I leave it out of consideration, and deal only with ss. 1(g) and 19(1).

There are many reported cases in which the meaning of the word "interest", as used in one or another connection, is discussed, but I have not been fortunate enough to find a case that appears to be of much assistance in the attempt to find the meaning that it carries in s. 1(g). *Harris v. Lindeborg et al.*, [1931] S.C.R. 235, [1931] 1 D.L.R. 945, and *In re Refund of Dues Paid under Timber Regulations*, [1935] A.C. 184, [1935] 2 D.L.R. 1, [1935] 1 W.W.R. 607, may be mentioned, the former for the distinction drawn between an interest in a mineral claim and an interest in the proceeds of the sale of that claim, and the latter, which is more nearly in point, for the decision that the rights of the holder of a "certificate of entry" issued under the Dominion Lands Act and a permit issued under a regulation set out in the judgment are interests in land, although neither case has a very direct bearing upon the question of the meaning of the word "interest" in the connection in which it is used in s. 1(g). My own opinion, however, is that, regard being had to the fact that the whole expression in which the word occurs is "every estate and interest" and to the fact that the person who by s. 19(1) comes under liability for duty because property passes to him is the person to whom dutiable property passes "for any beneficial interest in possession or in expectancy", the interest mentioned in s. 1(g) is one of those interests that can, so to speak, be carved out of the total ownership, such, for instance, as the "entrant's" rights discussed in the case last cited. The persons who are benefited by clause IV(g) of the will are, no doubt, interested in the trustees' performance of their obligation under the clause; but that is not to say that they have an interest, or a beneficial interest in possession or in expectancy, in the money that the trustees are directed to pay. It would be strange indeed if a benefit to be derived by one of those persons from the payment of duty-free money to the Treasury should be declared to be a dutiable interest in that self-

same money. In a taxing statute the clearest of language would be required to show that such an absurdity was intended.

For these reasons my opinion is that the answer to Question 2(a) ought to be in the negative.

Question 2(b): Counsel for the Attorney-General and the Treasurer took no part in the argument of this question, but it was much debated by counsel for all the other persons interested, all of them except Mr. R. F. Wilson on behalf of the charities represented by him contending for such a construction of clause IV(g) as would cast liability upon the general estate, the desire of the members of the immediate family of the testator, as expressed by Mr. Tilley, being that however it might affect their financial position they desired full effect to be given to the wish of the testator, and that they believed that wish to be that, subject to the exception stated in the clause, neither any disponent nor any beneficiary should have to pay anything to the Treasury because of the fact that he was such a disponent or beneficiary. Mr. Tilley said that without some complicated computations, which had not been made or of which he was not aware, it was difficult to say how a decision in the one sense or in the other would really affect his clients financially. But because any payments to be made under the clause would reduce the amount of the residue in which Mr. Wilson's clients are interested, Mr. Wilson contended for a narrower reading of the clause. However, Question 2(b) does not arise if my answer to Question 2(a) is correct, and although I have an opinion as to what the answer ought to be, I deem it advisable to refrain from expressing it.

Question 2(c): What has just been said about Question 2(b) applies also to the question whether there arises what Martin J.A. in *In re Anderson Estate; Canada Permanent Trust Company v. McAdam*, *supra*, calls "an endless chain of duty." The chain would not actually be quite endless: counsel mentioned, but I do not remember accurately, the number of steps that would have to be taken before the latest duty became so small as to be negligible, and the number was not quite as great as might have been supposed. That, however, is by the way. It is not desirable, before the necessity arises, to hazard an opinion upon the question whether the chain itself comes into being, or upon the manner in which, if it does, the duty payable under clause IV(g) ought to be computed.

The answer to Question 1 will be as indicated in the foregoing statement of my opinion, care being taken in the framing of it to make it clear that liability to pay the duty to which the Act professes to subject the disposition does not arise unless the person in whose favour the disposition was made was domiciled or ordinarily resident within Ontario at the time of the death of the testator. An unqualified answer in the affirmative to the question as framed, namely, whether the executor must pay succession duties in respect of dispositions, provided they were dispositions which the Act purports to render dutiable, would be unsatisfactory if in fact there were dispositions which, while falling within the words of the Act, were not dispositions in favour of persons who, at the taxing date, were subject to the jurisdiction of the Ontario Legislature.

The costs of all persons represented on the argument ought to be paid out of the estate, those of the trustees being taxed as between solicitor and client.

Order accordingly.

Solicitors for the executor: Blake, Lash, Anglin & Cassels, Toronto.

[COURT OF APPEAL.]

Rex v. Eakins.

Criminal Law—Disorderly Houses—What Constitutes “Keeping”—Accused merely Frequenting Hotel, without any Proved Right or Connection with Premises—The Criminal Code, R.S.C. 1927, c. 36, s. 229(2).

A person who merely frequents the public rooms of an hotel, and there accepts bets and settles for bets previously made, without acting or behaving as master or as a person having any care, government or management of the hotel premises, or assisting in such care, government or management, and who is not even shown to have had any right to be there, cannot, in view of s. 229(2) of The Criminal Code, be convicted of keeping a common betting house in the hotel. *Rex v. Marin*, [1937] O.R. 507, not followed.

Judgments and Orders—Stare Decisis—Whether Court of Appeal Bound by its own Previous Decisions.

Per Kellock J.A.: The Court of Appeal is not bound, in all circumstances, to follow its own previous decisions. The rule of the English Court of Appeal, as recently enunciated in *In re Shoesmith*, [1938] 2 K.B. 637, at pp. 644, 645 and 652-3, and applied in the earlier decision in *Wynne-Finch v. Chaytor*, [1903] 2 Ch. 475, applies to this Court. *Stuart v. Bank of Montreal et al.* (1909), 41 S.C.R. 516 at 535, applied.

AN appeal by the accused from his conviction by a police magistrate on a charge of keeping a common betting house. The facts are fully stated in the judgment of ROBERTSON C.J.O.

1st February 1943. The appeal was heard by ROBERTSON C.J.O. and McTAGUE and KELLOCK JJ.A.

A. G. Ross, K.C., for the accused, appellant.

W. B. Common, K.C., for the Crown, respondent.

26th February 1943. ROBERTSON C.J.O.:—This is an appeal from the conviction of the appellant by Police Magistrate Robert J. Browne, at Toronto, on the 21st day of December 1942, of keeping a common betting house contrary to s. 229 of The Criminal Code.

The appellant was seen on a number of occasions to come into one of the public rooms of the Grosvenor Hotel on Yonge Street and have transactions with persons sitting there, who in some cases placed bets with him on horses running at race tracks in the United States. In other cases appellant's business with others consisted in informing them of the result of races on which they had placed bets, and in making settlement with those who had won something. On leaving the hotel premises the appellant was then seen to go to another place on Yonge Street where, presumably, he completed the betting transactions according to the instructions he had received, and turned in the money that had been placed with him.

There is no evidence whatever that the appellant acted or behaved as master or as a person having any care, government or management of the hotel premises, or that he assisted in such care, government or management, or in fact that he had any right at all to be there, unless that might be inferred from his frequently going there for the same purpose.

It is impossible to say, upon the evidence, that the appellant was the keeper of the hotel premises, or of any part of the premises, within the ordinary meaning of the word "keeper". Neither upon the evidence can he be deemed to be the keeper and to be liable to be prosecuted and punished as such under subs. 2 of s. 229. We are, however, referred to the decision of this Court in *Rex v. Marin*, [1937] O.R. 507, 68 C.C.C. 245, [1937] 2 D.L.R. 782.

The facts in the case cited are remarkably like the facts in the present case. It does not appear, however, from the report

of the decision that subs. 2 of s. 229 was brought to the attention of the Court, and it would appear from the reasons for judgment in that case that it was dealt with as if one who used premises as the Grosvenor Hotel premises were used by this appellant, might be deemed to be the keeper of the place.

In view of the provisions of subs. 2 of s. 229, it would seem to be out of the question to convict as the keeper of the premises, one whose only connection with them was such as the use made of them by the appellant in this case. Under the circumstances we do not think that we would be warranted in overlooking the express terms of the statute and in following the decision in *Rex v. Marin*. We therefore allow the appeal and quash the conviction.

McTAGUE J.A.:—I agree.

KELLOCK J.A.:—I am of the same opinion. For the reasons pointed out by my Lord I do not think we are bound to follow the decision of this Court in *Rex v. Marin, supra*. The rule applicable to the Court of Appeal in England applies to this Court: *Stuart v. Bank of Montreal et al.* (1909), 41 S.C.R. 516 at 535. That rule has been recently stated in *In re Shoesmith*, [1938] 2 K.B. 637 at pp. 644, 645 and 652-3, and was applied by the Court of Appeal in England in *Wynne-Finch v. Chaytor*, [1903] 2 Ch. 475. I therefore think the appeal should be allowed and the conviction quashed.

Appeal allowed and conviction quashed.

Solicitor for the accused, appellant: Austin G. Ross, Toronto.

Solicitor for the Crown, respondent: C. L. Snyder, Toronto.

[COURT OF APPEAL.]

McLean v. Little.

Sale of Land—Specific Performance—No Sufficient Memorandum in Writing to Satisfy The Statute of Frauds, R.S.O. 1937, c. 146—Part Performance — Whether Acts Necessarily Referable to Contract—Joint Notice to Tenant to Quit—Building of Boundary Fence by Vendor at Purchaser's Insistence, in Pursuance of Terms of Contract.

In an action for specific performance of a contract for the purchase of land by the defendant, the Court was of opinion that there was no sufficient memorandum of the contract in writing to satisfy The Statute of Frauds, R.S.O. 1937, c. 146. *Held*, affirming the judgment at trial, there were sufficient acts of part performance to take the case out of the statute, and to enable the Court to decree specific performance. The first of such acts was the giving, by the plaintiff and the defendant jointly, of a notice to the tenant to quit the property. *Daniels v. Trefusis*, [1914] 1 Ch. 788, applied. The second such act was the building, by the vendor's husband, of a boundary fence dividing the property sold from other property of the vendor. This act, which was done on the purchaser's insistence, and in pursuance of a term in the agreement, was necessarily referable to a contract such as was alleged by the plaintiff, and to no other title. *Fry on Specific Performance*, 6th ed., p. 276; *Rawlinson v. Ames*, [1925] 1 Ch. 96, applied.

As to the form of the judgment in such an action, the Court referred to *Cooper v. Morgan*, [1909] 1 Ch. 261 at 262, and *Robinson v. Galland* (1889), 60 L.T. 697.

AN appeal by the defendant from the judgment of Urquhart J., [1942] O.W.N. 615, [1942] 4 D.L.R. 694, in an action for specific performance of an agreement for the purchase of land by the defendant from the plaintiff. The facts are fully stated in the judgment below, and in the judgment now reported.

The formal judgment at trial, after a declaration that the contract was binding, and a finding as to the amount owing as at the date of closing, ordered and adjudged that the plaintiff be allowed interest at the rate of 5 per cent. from that date to the date of payment, and that in the event of any dispute as to the computation of the amount there should be a reference to the Local Master at Windsor. The judgment then proceeded as follows:

"4. This Court doth further declare that the Defendant has accepted the title of the said lands and premises in the pleadings mentioned as shown in the Plaintiff and that a conveyance satisfactory to the solicitor for the Defendant has already been drawn and executed.

"5. And upon the Defendant on the 1st day of December, 1942, paying to the Plaintiff or to whom she may appoint at the Registry Office for the County of Essex the sum due as

above found, this Court doth order and adjudge that the plaintiff do convey and assure or cause to be conveyed or assured the said lands and premises to the Defendant or to whom she shall appoint in accordance with the said contract.

"6. But in default of the Defendant making such payment within the time above limited then this Court doth adjudge that the Plaintiff recover against the said Defendant the amount found as above by the Local Master or as agreed upon.

"7. And this Court doth further order and adjudge that the Defendant do pay to the Plaintiff her costs of this action after taxation thereof; and that the costs of the reference if necessary shall be in the discretion of the Local Master."

5th February 1943. The appeal was heard by ROBERTSON C.J.O. and McTAGUE and KELLOCK JJ.A.

E. C. Awrey, K.C., for the defendant, appellant: There has been no sufficient part performance of this contract within the principles laid down in *Maddison v. Alderson* (1883), 8 App. Cas. 467. I refer also to Fry on Specific Performance, 6th ed., pp. 276 and 280-1; also Halsbury, 2nd ed., vol. 29, pp. 245-247 and vol. 31, pp. 359-369.

The acts relied upon as part performance must be those of the plaintiff: *Coates v. Coates* (1887), 14 O.R. 195; *O'Reilly v. Thompson* (1791), 2 Cox 271, 30 E.R. 126. Where a vendor is required to perform certain conditions before he can demand completion of the contract, his acts done for this purpose cannot be regarded as part performance: *O'Reilly v. Thompson, supra*.

The payment of a deposit by the purchaser cannot be regarded as part performance. Nor can the fact that she joined in the notice to vacate given to the tenant. The tenant swore in his evidence that he had previously agreed to vacate, and the vendor had agreed, in the contract, to give vacant possession, which distinguishes this case from *Daniels v. Trefusis*, [1914] 1 Ch. 788, in which, further, the Court had already found a sufficient memorandum in writing to satisfy The Statute of Frauds. In *Daniels v. Trefusis* acts were done specifically on behalf of the purchaser, but the acts which the trial judge here has accepted are such as the respondent might well have done merely to preserve her own property, such as repairing the plaster and building the line fence. The handing over of the key to the appellant's son cannot be sufficient, since the key was

returned the same evening. [KELLOCK J.A.: Did the appellant ask to have the plaster repaired before she refused to continue with the transaction?] The plaster was not repaired until afterwards.

The acts done by the owner, to constitute part performance, must be such as are inconsistent with his own title to the property; they must be clearly designed to give the purchaser a good title. [McTAGUE J.A.: In view of the letter written by the appellant demanding the repair of the fence, you surely cannot contend that that repair was not referable to the contract, and arising unequivocally out of it.] The acts themselves must be considered, with reference to all the surrounding circumstances: *Ireland v. Cutten*, [1940] O.R. 12, [1939] 4 D.L.R. 681. [KELLOCK J.A.: Surely the act and the request must be considered together.]

In *Daniels v. Trefusis*, *supra*, the notice to the tenant was found to be an act of possession. [KELLOCK J.A.: Must the act be one which is equivalent to taking possession?] It was a step towards putting the defendant into possession, and something which the defendant was required to do himself. In this case, there are no equities arising out of it, but in *Daniels v. Trefusis* equities arose because the vendor did something which he was not bound to do. Here, the vendor's relationship towards the property was not altered by any act of the purchaser, and no equity arose changing this relationship.

This is not a case for specific performance. Equitable relief is being sought on contradictory evidence.

W. D. Conklin, for the plaintiff, respondent: It is very difficult to find any act, performed by a vendor, which is unequivocal, unless it is accompanied by a request. Each individual act may be one of a series, which, taken together, will constitute part performance: *Dickinson v. Barrow*, [1904] 2 Ch. 339; *Cameron v. Spiking and Teed* (1877), 25 Gr. 116.

The appellant contends that in *Daniels v. Trefusis*, [1914] 1 Ch. 788, the vendor was not bound to give vacant possession, but the report is not clear upon that point. [ROBERTSON C.J.O.: The appellant's contention is rather that the tenant here was vacating in any event, and that nothing was accomplished by the sending of a notice to vacate.] But it cannot be said that the notice did not influence the tenant to some degree.

Delivery of a key is considered delivery of possession: *Guest v. Homfray* (1801), 5 Ves. Jun. 818 at 823, 31 E.R. 875 at 877. [McTAGUE J.A.: There were special circumstances in that case; you cannot lay down a general rule.] The delivery of the key fits in with other acts, and taken in conjunction they form a chain of unequivocal acts, although some of them alone might be considered equivocal. [McTAGUE J.A.: I cannot see how acts can change their character.]

In addition to the acts already mentioned, there was the final one, the signing of the conveyance. Instructions were given to the solicitor to have the deed executed, and such instructions in themselves have been held to constitute part performance: *Child v. Comber* (1723), 3 Swanst. 482, 36 E.R. 934.

Only in exceptional circumstances will the trial judge's findings of fact be overruled on appeal. There are no special circumstances in the case at bar which would justify a reversal of the findings of fact, and the appeal should therefore be dismissed.

E. C. Awrey, K.C., in reply: In all the cases cited, something occurred that materially altered the position of the vendor to his detriment. It is a fundamental principle of this branch of the law that where the acts of the party to be charged have not caused a change of position in the other party, and where the acts alleged as part performance are not such as to render it fraud for the other party to refuse to perform his part of the contract, there will be no decree for specific performance: Fry, *op. cit.*, p. 280.

Cur. adv. vult.

26th February 1943. The judgment of the Court was delivered by

KELLOCK J.A.: This is an appeal from the judgment of Urquhart J., pronounced on the 18th November 1942, after a trial without a jury. The action was brought for specific performance of an agreement for the purchase by the defendant of certain residential premises, the property of the plaintiff. As the agreement of purchase and sale found by the trial judge was not sufficiently expressed in writing to satisfy the provisions of The Statute of Frauds, R.S.O. 1937, c. 146, the respondent relied upon certain alleged acts of part performance. The sufficiency of these was the main subject of controversy on the

appeal. The notice of appeal also sets up that the learned trial judge ought not to have held that the appellant had accepted the respondent's title, and that the judgment should not have directed payment of a specific amount in favour of the respondent in the event that there should be default on the part of the appellant in closing the sale. No serious attempt was made in argument to support the first of these two last-mentioned points.

With the exception of two acts, to be considered separately, I do not think the alleged acts of part performance relied upon by the respondent are sufficient. The two exceptions to be considered are: First, the giving by the appellant and the respondent jointly of a notice to quit to the tenant of the premises; and, secondly, the building of a boundary fence by the respondent at the appellant's request.

Dealing with the notice itself, it is dated 28th April 1942, is directed to the tenant, and is signed by both parties. It is in the following terms:

"Take notice that you are to vacate the housing accommodation which you occupy as the tenant of Mrs. Harry McLean on the North side of Munger Avenue in the Town of Harrow on the 31st day of May, 1942.

"Mrs. McLean has sold the property to Mrs. Lily Little and Mrs. Little requires the said housing accommodation as a residence for herself.

"This notice is given in accordance with the regulations of The Wartime Prices and Trade Board."

On 21st April, after the agreement of purchase and sale had been made, the respondent's husband advised the tenant in the appellant's presence that the premises had been sold, and asked him if he could be out by 31st May following. The tenant said he could. The notice of 28th April came into existence, as the appellant puts it, because the solicitor who was acting for her as well as for the respondent, thought that she (the appellant) "should do that". I think the result of the evidence is that, while the parties knew that the tenant had expressed himself as willing to leave by 31st May, the appellant, on advice, thought that a formal notice was necessary as a precaution, and requested the respondent to join in the notice. The notice itself refers to the rental regulations of The Wartime Prices and Trade Board, and the appellant says that the solicitor advised

her that on account of these regulations she should have the notice given. Whether or not the notice was a valid notice, and binding upon the tenant, is, in my view, unimportant, as it was evidently so regarded by the parties to this action. The tenant did in fact vacate the premises, and vacant possession was available to the appellant on 1st June.

In *Daniels v. Trefusis*, [1914] 1 Ch. 788, the property which formed the subject matter of the contract there in question was occupied by two weekly tenants. At the request of the defendant (the purchaser), the vendor gave notice to these tenants, who went out of possession in consequence. It was held by Sargant J. that this incident constituted an act of part performance as unequivocally referable to the contract as if the defendant had taken possession of part of the property. His Lordship goes on to say that it was in fact a step towards putting the purchaser into actual vacant possession at an earlier date than he could otherwise have obtained it, but I do not understand that the obtaining of earlier possession was a material circumstance.

In my opinion the principle applied by Sargant J. in the *Daniels* case was rightly applied by the learned trial judge to the facts in the case at bar.

With regard to the fence, it was a term of the agreement between the parties that the respondent should erect a wire fence along the boundary dividing the property in question from other property of the respondent to the rear. The appellant was to have possession of the premises by 1st June 1942, but it was arranged that the transaction would not be closed until 6th June. On 28th May the appellant wrote to the respondent's husband as follows:

"I am not going to pay any more money. I am holding you to your agreement to fix the line fence . . . I am keeping to my agreement but you are not."

As a result of this letter respondent's husband began the erection of this fence before 1st June, but the work was still in progress when he received a letter from the appellant dated 3rd June 1942, repudiating her agreement to buy.

In *Fry on Specific Performance*, 6th ed., p. 276, the author states that in order to withdraw a contract from the operation of The Statute of Frauds, several circumstances must concur: first, the acts of part performance must be such as to be referable not only to a contract such as that alleged, but to no other

title; secondly, they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing. It is not necessary to refer to the other circumstances there mentioned.

In *Rawlinson v. Ames*, [1925] 1 Ch. 96, the defendant had entered into an oral contract with the plaintiff to take a lease of a flat. It was agreed that certain alterations should be made to the flat. During the progress of the alterations the defendant frequently visited the flat and made suggestions for further alterations, which were carried out by the plaintiff at her request. Subsequently the defendant repudiated the contract, and upon action being brought she relied on The Statute of Frauds. It was held in that case by Romer J. that the acts done by the plaintiff at the request of the defendant were acts of part performance taking the case out of the statute. In his judgment, at p. 111, Romer J. refers to the judgment of Lord Selborne in *Maddison v. Alderson* (1883), 8 App. Cas. 467, as follows:

“‘In a suit founded on such part performance, the defendant is really “charged” upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow’.” And again: “‘ . . . it is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestae* subsequent to and arising out of the contract. So long as the connection of those *res gestae* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the *res gestae* themselves, justice seems to require some such limitation of the scope of the statute, which might otherwise interpose an obstacle even to the rectification of material errors, however clearly proved, in an executed conveyance, founded upon an unsigned agreement’.”

In the course of his judgment, Romer J., at p. 114, refers to the acts of part performance there in question, and says:

“Now the mere fact that the plaintiff converted part of her premises into the flat and expended money thereon is not *only* referable to a contract such as that alleged. It is equally referable

to her ownership of the premises. Nor would this improvement by the plaintiff of her own property be such an act as to render it a fraud in the defendant to take advantage of the contract not being in writing. It is, however, to be observed that in the present case the plaintiff in altering her premises and expending money in the alterations was doing so in accordance with requests and suggestions made to her or her employees from time to time by the defendant. It appears to me that this fact necessarily suggests the existence of some such contract as alleged."

While in that case there was a series of acts, and in the present case there is one act only, namely, the building of a fence, I think the principle of the decision applies whether there is one act or more than one. The building of the fence by itself would amount to nothing. But the building of the fence at the defendant's request is a different matter, and, in my opinion, is an act of part performance upon which the plaintiff may rely. I therefore think on this ground also that the respondent is entitled to succeed.

With respect to the judgment itself, it is to be noted that the appellant, as found by the learned trial judge, has accepted the respondent's title and has approved of the conveyance which by the day fixed for closing the respondent had executed and placed in the hands of the common solicitor for delivery to the appellant. The respondent had also attended at the time and place fixed for closing.

In *Cooper v. Morgan*, [1909] 1 Ch. 261 at 262, there is to be found a form of judgment which would be applicable. This form does not fix a date for payment of purchase money and for delivery of the conveyance. In *Robinson v. Galland* (1889), 60 L.T. 697, the judgment authorized the officer directed to take the account to fix the time and place for payment by the defendant and for delivery to the defendant of the conveyance. I think it would have been better had the formal judgment in the present case followed either one or the other of these well-settled forms, but I think there is no serious objection to the provision in the formal judgment of which the appellant complains, as it was held in *Robinson v. Galland*, *supra*, that upon default in payment by the defendant, the plaintiff was entitled to the issue of execution. I therefore think that on all grounds the appeal should be dismissed with costs.

As a result of the appeal the date fixed by the judgment for payment by the appellant and for delivery by the respondent of the conveyance has now passed. I think that the formal judgment should be amended to provide that the Local Master, who is to take the account, should fix the time and place for payment and delivery of the conveyance, and that the Local Master should, in accordance with the authorities already referred to, include in the amount to be paid by the defendant the costs of the action and the appeal, which are to be taxed and paid by the appellant.

Appeal dismissed with costs.

Solicitors for the plaintiff, respondent: Goodeve & Conklin, Kingsville.

Solicitor for the defendant, appellant: Charles A. Bell, Windsor.

[HOGG J.]

Emberson et al. v. Fisher et al.

Partnership—Dissolution by Death of Partner—Rights of Surviving Partners and of Personal Representative of Deceased Partner—Personal Representative Carrying on Business as Estate Asset—Winding up and Damages—The Partnership Act, R.S.O. 1937, c. 187, ss. 20, 24, 32, 33, 38, 39.

Where a partnership is dissolved by the death of a partner, it should be immediately wound up. Neither the surviving partners nor the personal representative of the deceased partner may carry on the business, except to the extent necessary for a winding up. If the administratrix of the deceased partner wrongfully carries on the business as an asset of the estate, the surviving partners will be entitled to damages to the extent, if any, that the saleable value of the business has been decreased by this carrying on. Such damages can properly be ascertained in winding-up proceedings.

AN action for an accounting and winding up of an alleged partnership, damages, and other relief. The plaintiffs claimed to be the surviving members of the partnership, and these claims were made against the widow and administratrix of the deceased partner. There was also a claim for a declaration that certain land, conveyed by the deceased to his daughter (also a defendant in the action) and reconveyed by her to him, was a partnership asset.

18th to 22nd and 26th to 29th May, and 1st and 2nd June 1942. The action was tried by HOGG J. without a jury at Toronto.

W. N. Tilley, K.C., and *J. P. Erichsen Brown*, for the plaintiffs.

G. T. Walsh, K.C., and *Russell Nesbitt, K.C.*, for the defendants.

9th March 1943. HOGG J.:—The plaintiffs allege that they and the late Alexander D. Fisher, who died on the 4th December 1938, at one time carried on business as partners in the operation of a tea room in the city of Toronto, and also that from the year 1926 the partnership conducted and managed a summer resort at Pow Wow Point on Peninsula Lake in the district of Muskoka. The plaintiffs further allege that upon the death of Mr. Fisher, his widow, the defendant Mrs. Fisher, entered into, and assumed exclusive control of, the partnership premises on Peninsula Lake, advertised the resort as being part of her husband's estate and operated it, purporting to act as administratrix of her husband's estate, without regard to the plaintiffs or their interests therein. The plaintiffs claim an accounting and winding up of the busi-

ness and the payment to them of their shares therein, also damages from the defendant Mrs. Fisher, or in the alternative the plaintiffs claim remuneration for their services rendered in connection with the business.

The evidence shows that the plaintiffs and Alexander Fisher formed a partnership in February 1923 to carry on the business of a tea room and of caterers in the city of Toronto. No formal partnership agreement in writing was ever executed, but in November 1926 a declaration was signed by the plaintiffs and Fisher, and registered, setting out that a partnership had subsisted from the 15th February 1923, carrying on the trade and business of caterers and confectioners in Toronto under the name of "Five Sisters Caterers and Confectioners". Fisher was interested in a number of other businesses, and the tea room was managed and carried on almost wholly by the plaintiffs.

Fisher was the owner of a property at Pow Wow Point on Peninsula Lake upon which stood a summer cottage, a cabin, a pumphouse and a boat-house, and it was decided by the plaintiffs and Mr. Fisher that the Five Sisters tea rooms should be carried on at the Pow Wow Point property as well as in the Toronto premises. This decision was duly advertised, and in the summer of 1926 the Pow Wow premises were opened up and some eight or ten guests were accommodated. The Dominion Bank at Huntsville was chosen as the bank in which the partnership account relating to the Pow Wow business should be kept and an account was opened in the name of "Five Sisters" of Pow Wow Point. On the 26th July 1926, the plaintiffs and Fisher signed an agreement in the terms of a printed form furnished by the said bank to the effect that the plaintiffs and Fisher constituted the members of a firm carrying on the business, under the name "Five Sisters", of a tea room at Pow Wow Point and that each of the partners was authorized to transact the banking business of the firm. The agreement stated that it was to be binding upon the plaintiffs and Fisher until the bank received written notice of the dissolution of the firm and also was to be binding upon the executors and administrators of each of the parties after the death of any or either of them, until the partnership affairs were wound up or the agreement was cancelled.

The venture prospered, and eventually a greater number of persons desired to visit the resort than could be accommodated. I find that in large part the actual work of conducting and look-

ing after the operation of the Pow Wow resort devolved upon the plaintiffs, although as the business grew in extent Fisher took a greater interest in it. He initiated, planned and superintended the erection of new buildings or cabins, and he attended to the acquisition of more land and the purchase of certain boats, as well as other equipment and requirements used in conducting the business. The plaintiffs were concerned almost wholly with the internal management and operation of the resort. As time went on, the name of the resort was changed several times, the words "Five Sisters" being retained until 1935, when the name became "Pow Wow Summer Resort". I find that the several changes in the name of the resort, and the purchase of adjoining land and of boats, and the erection of additional buildings, were the subject of discussion among the plaintiffs and Fisher. Certain letters written by Fisher show that buildings and equipment respecting the property were paid for in very considerable part from the earnings of the business.

On the 23rd December 1933, an agreement with the Dominion Bank in Toronto was signed by the plaintiffs and Fisher upon one of the usual bank forms, declaring that they constituted the members of the firm of "Five Sisters" carrying on a tourist resort business at Pow Wow Point and setting out that the agreement should be binding upon the parties signing it until notice of dissolution was given to the bank, and further that it should be binding on the executors and administrators of each of the parties after the death of any of them until the firm was wound up.

It is apparent that as Fisher became more interested in the resort and as its business continued to increase, he became imbued with the idea that he should be considered to be the sole owner of the business, and that the partnership with the plaintiffs should no longer be considered to exist. On the 25th March 1935 Fisher drew up a document in his own handwriting in the form of a will, copies of which were made in typewriting and given to the plaintiffs. In this document Fisher refers to himself as the sole proprietor of the summer resort and purports to devise and bequeath the land, buildings and equipment in shares to his daughter, the defendant Dorothy Alving, and to each of the plaintiffs. Shares in other business interests of Fisher are also purported to be given to the plaintiffs. This document was never signed in proper form as a will by Fisher, although I accept

the evidence of the plaintiffs that Fisher told them the document would be so executed. The plaintiffs testified that they both questioned Fisher with reference to the statement in the document that Fisher was the sole proprietor of the Pow Wow Resort and in answer he stated that he was giving the plaintiffs not only an interest in the resort but also an interest in his other business ventures, and that they would therefore be just as well off in the event of his death as if they still had their shares in the partnership, and also that even if the document should not be executed as a will they would in that event still retain their full partnership interests in the Pow Wow Resort.

On the 11th July 1935, notwithstanding that the Dominion Bank at Huntsville had in its possession, in full force and effect, the agreement signed by the plaintiffs and Fisher of the 26th July 1926, setting out that they were partners in the Pow Wow Resort, the bank accepted a declaration signed by Fisher alone that he was the sole owner of the Pow Wow Summer Resort and also accepted from him powers of attorney giving the plaintiffs power to carry on the banking business of the resort. The plaintiffs both swear that they never saw or heard of these documents until after the trial of this action had been commenced, and I accept this statement on their part as a fact. It is to be regretted that at the trial there was no explanation given by, or on behalf of, the bank of the unusual action on its part in accepting this declaration from Fisher that he was the sole owner of the summer resort, while the agreement of the 26th July 1926 remained in full effect, as there is no evidence that the bank had ever received notice of the dissolution of the partnership from the members of the firm, or that the prior agreement had been cancelled.

Each year, pamphlets or booklets advertising the advantages of the resort were mailed and sent out to various persons. From and after 1935, Fisher described himself in them as the sole proprietor of the business. The plaintiffs say that this was done without their knowledge after the proofs of the booklets had been approved of by the plaintiffs, or that when Fisher would refer to himself or describe himself as the sole proprietor of the business, the plaintiffs believed Fisher had executed the will in their favour above referred to.

I have concluded, and so find, that a partnership existed consisting of the plaintiffs and Fisher, in the carrying on of the

business of a tea room in Toronto, and that this same partnership afterwards commenced in the year 1926 to carry on the business of a tea room and summer resort at the Pow Wow Point premises. It is true that there never existed a formal partnership agreement between the parties, but the whole of the facts and the conduct of the parties as well as the agreements signed by the parties in 1926 and in 1933 with the Dominion Bank are evidence showing that the partnership existed with respect to the summer resort. A partnership may be proved to exist as a matter of fact by evidence of various circumstances which relate to the question at issue and which show the intention of the parties. Such evidence may be an admission made by anyone of that fact against himself, also evidence tending to show that a partnership exists, and may consist of letters, documents, bills of exchange and things of like character: *Cox et al. v. Hickman* (1860), 8 H.L. Cas. 268; *The Electric Heat Control Company v. McClennan et al.*, [1940] O.W.N. 49.

By s. 24 of The Partnership Act, R.S.O. 1937, c. 187, and subject to any agreement between the partners, all parties are entitled to share equally in the capital and profits of the business. Although Fisher contributed a considerably greater amount of tangible assets to the business than the plaintiffs, due to the fact that the original land and buildings and equipment at Pow Wow Point were owned by him, nevertheless I am of opinion it was the industry, hard work and devotion to the business on the part of the plaintiffs which largely contributed to its success. "Equality in sharing profit and loss, independent of the shares of original capital contributed by the partners, is the only rule applicable in the absence of special agreement. The value of a particular member to the firm, derived from his skill, experience, or business connexion, may be wholly out of proportion to the amount of capital brought in by him." Pollock, *Digest of the Law of Partnership*, 13th ed., p. 82.

"Whether, therefore, partners have contributed money equally or unequally, whether they are or are not on a par as regards skill, connection, or character, whether they have or have not laboured equally for the benefit of the firm, their shares will be considered as equal, unless some agreement to the contrary can be shown to have been entered into." Lindley on *Partnership*, 10th ed., p. 424.

S. 32 of the Act provides that, subject to any agreement between the partners, a partnership is dissolved, if entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership, and by s. 33, subject to any agreement, a partnership is dissolved by the death of a partner. No notice of dissolution of the partnership, as required by s. 32 of the statute, was ever given to anyone by any of the partners.

It is argued on behalf of the defendant Mrs. Fisher that even if a partnership had existed prior to 1933, it was ended in the year when the discussion took place between the plaintiffs and Fisher with respect to the intended will. Voluminous evidence to the effect that Fisher carried on and conducted many of the activities of the business, such as the inauguration and supervision of the erection of new buildings, the purchase of land and of boats and equipment, and the attention to the banking business of the resort, was introduced to demonstrate that the partnership must be considered to have come to an end at least by 1935. But although it is apparent that by all of his various activities Fisher endeavoured to show and to establish that he was the sole owner of the business, nevertheless the partnership, which I have found existed, could not be dissolved by any unilateral act or acts on the part of Fisher alone, and in order to end the partnership it must be found that the plaintiffs had in some manner agreed and consented to a dissolution of the firm, before the death of Mr. Fisher. By s. 20 of the Act, the mutual rights and duties of partners, whether ascertained by agreement or defined by the statute, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing. In *England v. Curling* (1844), 8 Beav. 129, 50 E.R. 51, Lord Langdale M.R. said, at p. 133: ". . . with respect to a partnership agreement, it is to be observed, that all parties being competent to act as they please, they may put an end to or vary it at any moment; a partnership agreement is therefore open to variation from day to day, and the terms of such variations may not only be evidenced by writing, but also by the conduct of the parties in relation to the agreement and to their mode of conducting their business."

The plaintiffs are quite frank in stating that they were willing to give up their shares and interest in the partnership to Fisher if they received from him the benefits set out in the docu-

ment which was to have been, but which never was, executed by Fisher as his will, and I accept their testimony that they thought and believed that Fisher had signed this document in the form of a will. Not only did they not receive such benefits, but at no time was there ever any chance of their receiving those benefits. Any agreement signified by any act or by conduct on the part of the plaintiffs to end the partnership and assign their shares in it to Fisher was conditional upon Fisher signing a will containing terms such as have been described. This condition was never fulfilled by Fisher. No consideration was ever received by the plaintiffs for any release or transfer to Fisher of their shares in the business.

The auditors' statements show that the plaintiffs drew out of the business a comparatively small amount from the time it was first started, and their capital in the partnership consists almost entirely of their share of profits, which they allowed to remain in the business.

It follows from my conclusion that the partnership in which the plaintiffs held a two-thirds interest existed up to, and did not come to an end until, Mr. Fisher's death on the 4th December 1938, and that steps should then have been taken to wind up its affairs. The defendant Mrs. Fisher, however, looked upon the partnership property and business as being owned solely by her husband, and on the 9th and 10th February 1939, several months after her husband's death, Mrs. Fisher advertised in several Toronto newspapers that the Pow Wow resort would be continued under her management, as administratrix of her husband's estate. The plaintiffs were wholly excluded from having any part in the control or management of the partnership assets, and were prevented to that extent from carrying out their duty of winding up the partnership. I find that Mrs. Fisher had no right to take over the premises in question to the exclusion of the plaintiffs.

Counsel for the plaintiffs contended that the plaintiffs did not wish the delay and expense of an accounting and of winding-up proceedings, but merely claimed to be awarded damages against the defendant Mrs. Fisher for her wrongful act in attempting to include the whole of the business and its assets in the estate of her late husband and in assuming sole and complete physical control of the property to the total exclusion of the plaintiffs. No authority was cited to me establishing that the

plaintiffs had a right to damages in the circumstances present in this case, but I have given careful consideration to this claim.

The death of Mr. Fisher dissolved the partnership and it is therefore necessary, in considering this claim to be awarded damages, to inquire into the consequences which follow a dissolution of partnership as it affects the rights of the surviving partners and the personal representative of the deceased partner.

The partnership having been dissolved by the death of Mr. Fisher, s. 38 of the Act provides that the rights and obligations of the partners continue after dissolution so far as may be necessary to wind up the affairs of the partnership. By s. 39, every partner on dissolution is entitled to have the partnership wound up. It is only the share of the deceased partner, that is to say, his proportion of the partnership assets after they have been realized and converted into money and all the partnership debts and liabilities have been discharged, which passes to his personal representatives. Lindley on Partnership, 10th ed., p. 416. In *Darby v. Darby* (1856), 3 Drew. 495 at 503, 61 E.R. 992, Kindersley V.C. expressed the obligation resting on those interested in the partnership on its dissolution, in the following terms: "What is the clear principle of this Court as to the law of partnership? It is that, on the dissolution of the partnership, all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners according to their respective shares in the capital. That is the general rule; . . . it is inherent in the very contract of partnership." It would appear to be essential that the surviving partners, or failing them the representatives of the deceased partner, should proceed to wind up the partnership unless some agreement were arrived at by all interested parties to the contrary.

The plaintiffs were not deprived, by the act of Mrs. Fisher in taking over control of the business, of any right they had to carry on the business, for the plaintiffs had no such right except for the purpose of winding it up. The plaintiffs had merely the right to take immediate steps to have the business wound up, and they had also the right to have Mrs. Fisher restrained from carrying on the summer resort pending winding-up proceedings.

After dissolution a partner may restrain another partner or his representatives from carrying on the same business under

the partnership name until the partnership is wound up and the partnership property disposed of. While a liquidation of partnership affairs is pending, one partner must not use the name or property of the partnership to carry on business on his own sole account, since it is the duty of every partner to do nothing to prejudice the saleable value of the partnership property until the sale: Pollock, *op. cit.*, pp. 126 and 127. In *Whitney v. Small* (1914), 31 O.L.R. 191, it was said that unless the articles otherwise provide, neither the surviving partner nor the personal representatives of a deceased partner are entitled or bound to continue a partnership, though the term thereof may be unexpired at the time of death. See also *Turner v. Major* (1862), 3 Giff. 442, 66 E.R. 483.

The goodwill of a partnership is an asset of the firm which does not survive to the remaining partners upon the death of a partner unless by express agreement; a share of it belongs to the estate of the deceased partner, and it is saleable and divisible on dissolution or on the death of a partner: *Re Wood Vallance & Co.* (1915), 34 O.L.R. 278, 24 D.L.R. 831; this judgment of the Court of Appeal was reversed in part in the Supreme Court of Canada but not so as to affect the above stated proposition: *Wood v. Gauld et al.* (1916), 53 S.C.R. 51, 29 D.L.R. 246. Pending a sale, the surviving partner would not be allowed to appropriate to himself the goodwill which belonged to the partnership: *In re David and Matthews*, [1899] 1 Ch. 378.

In view of the aforementioned principles, it would seem that if, after dissolution, the personal representative of a partner should carry on the partnership business, purporting to do so on account of the estate of the deceased partner, and the saleable value of the partnership property should thereby be prejudiced and rendered of less value, and the share therefore of the other partner or partners in the surplus assets of the firm should be lessened in amount, the representative of the deceased partner who wrongfully carried on the business of his estate would be held responsible.

The plaintiffs are not entitled to damages on account of being deprived of any right to carry on, or to participate in carrying on, the summer resort after Fisher's death. Neither they nor Mrs. Fisher had such right except as it might be necessary to wind up the partnership. But on account of the wrongful act on the part of Mrs. Fisher in assuming control of the prop-

erty and carrying on the business alone, after the partnership was dissolved by her husband's death, the plaintiffs have a right to have made good to them any loss which they may have suffered if the sale price of the business has been adversely affected by Mrs. Fisher's acting as she did. This is a matter which can only be ascertained on winding-up proceedings. The evidence shows that the resort was not successful as a money-making project while it was managed by Mrs. Fisher. I am of the opinion that one of the chief assets of the business was the presence at the resort, and the work and activities, of the plaintiffs and of the late Mr. Fisher. I think the evidence establishes that the success of the venture, in the early days especially, was due in most part to the constant attention and industry on the part of the plaintiffs. I think that the matter must be worked out as was stated by Meredith C.J.O. in *Whitney v. Small, supra*, at p. 198, where, speaking of a partnership which was dissolved by the death of a partner, he said that he did not see why the rights of the parties could not be worked out under a judgment directing the partnership accounts to be taken. It would be open on the taking of the account to ascertain by what amount, if any, the sale price of the business was prejudiced because of the fact that the resort was carried on by Mrs. Fisher after her husband's death and therefore the shares of the plaintiffs were rendered less in amount. If it were found that loss was occasioned to the plaintiffs, then I am of the opinion that Mrs. Fisher would be accountable because of the improper act on her part in taking over the partnership business, and also that the plaintiffs would have a charge on the share of the estate of the late Mr. Fisher in the partnership for the amount of their loss. This result would seem to follow, as was argued by Mr. Tilley on behalf of the plaintiffs, from the judgment of Lord Macnaghten in *Dowse et al. v. Gorton et al.*, [1891] A.C. 190, at p. 203, where he said, "If the business has been properly continued as between the executors and the creditors. . . the executors are entitled to be indemnified against all liabilities properly incurred in carrying it on. If it has been improperly continued and the creditors choose to treat the continuance as improper . . . they may proceed in the proper way to make the executors accountable for the value of the assets used in carrying on the business, and they may also follow the assets and obtain a charge on the business in the hands of the executors for the value of the assets misap-

plied, with interest thereon; and they may enforce the charge, if necessary, by means of a receiver and a sale."

Coming now to the claim of the plaintiffs that a certain portion of the land at Pow Wow Point, respecting which a deed was given by Fisher to his daughter, the defendant Mrs. Alving, in 1924, and which she reconveyed to her father on the 7th May 1928, the consideration expressed being one dollar, are lands belonging to the partnership and should be so declared, this defendant states that her father gave her the land as a birthday gift and that she reconveyed the land back to him at his request because she and her mother contemplated going on a visit to Europe. Mrs. Alving said that her father stated that it would be a wise thing to reconvey this property to him in case she should die while in Europe, and further stated that he would not register the deed. Mrs. Alving said that the transaction was only in the nature of a temporary measure. This deed was not registered, and remained in the custody of Fisher for ten years until found with his other papers and documents at his death. At the same time Mrs. Fisher conveyed a property in Toronto to her husband upon his request, for the same reason, as stated by Mrs. Alving, and the deed of this property was not to be registered unless Mrs. Fisher died while abroad.

It is to be noted that in the amended statement of defence of Mrs. Fisher, in para. 7a, she pleads that Mrs. Alving claims that the deed in question given by Mrs. Alving to her father was delivered to him in escrow for a particular purpose, namely, to facilitate the disposition of the property for the benefit of Mrs. Alving, and further that all rights of Mr. Fisher ceased upon the return of Mrs. Alving to Toronto. Mrs. Fisher had Mrs. Alving added as a defendant in the action.

The purpose for which Mrs. Alving says she gave the deed to her father is altogether different from the purpose alleged in Mrs. Fisher's statement of defence, that Mrs. Alving reconveyed the property to Fisher to facilitate its disposition by him. Although the land had been conveyed to Mrs. Alving by her father in 1924, it had been used entirely for his own purposes until the partnership took it over, and afterwards by the partnership.

Miss Bertha Emberson testified that shortly after 1926 she knew that part of the Pow Wow property was in the name of Dorothy Alving and that upon her asking Fisher whether this land should not be in the name of the partnership, he told

her that it was to be used as partnership property, and that later in 1928 Fisher informed her that he had decided that this land should be reconveyed from his daughter to himself, to hold in trust for the partnership, and that he had had this done.

With due consideration of all the circumstances surrounding this transaction, I think that the conclusion which would seem to be the reasonable one is that Fisher considered the land in question as his to be made use of for his own purposes, and afterwards regarded it as part of the partnership assets, and that when his partners discovered that this land, which comprised a principal portion of their summer resort, was registered in Mrs. Alving's name, Fisher realized that he should have it reconveyed to himself to hold for the partnership, and that it was especially essential that this be done before his daughter went abroad for a year, in order to forestall any contingency that might happen because of her absence.

The land in question is declared to form a part of the partnership assets.

The necessary accounting will be proceeded with before the Master to have the partnership wound up, having regard to any prejudicial effect upon the interests of the plaintiffs because of the defendant Mrs. Fisher, purporting to act as administratrix, having taken over the control and management of the partnership business after the dissolution of the partnership on Mr. Fisher's death. If loss is found to have been so caused to the plaintiffs, Mrs. Fisher is held liable for the amount of such loss and the plaintiffs will have a charge on the share of the estate in the partnership for their loss. The defendant Mrs. Fisher, personally and as administratrix of her husband's estate, is restrained from further dealing with the partnership property. The plaintiffs are entitled to the costs of the action.

Judgment accordingly.

Solicitors for the plaintiffs: Erichsen-Brown & Strachan, Toronto.

Solicitors for the defendants: Nesbitt, Reid & Coy, Toronto.

[COURT OF APPEAL.]

Renshaw v. Phoenix Insurance Company of Hartford, Conn.

Insurance—Fire—Description of Risk—Moving House to New Location—Material Change in Risk—The Insurance Act, R.S.O. 1937, c. 256, s. 106(1); Statutory Condition 7.

The plaintiff moved a summer cottage, of which he was the owner, and which was insured by the defendant company, from an island to the mainland. The insurance policy was expressed to cover the cottage and its contents "while located and contained as described herein, and not elsewhere", and the description referred to its situation on the island. After the removal to the mainland the insurer's agent declined to insure the cottage unless the insured built a foundation under it. Before a foundation could be built, the cottage was destroyed by fire, and the insured sued under the policy.

Held, affirming the decision at trial, the action must be dismissed.

Per Robertson C.J.O. and Fisher J.A.: The cottage, when moved to the mainland, was no longer within the description as contained in the policy, and was therefore not part of the risk assumed by the insurer. There was nothing in this limitation of the risk which was inconsistent with, or varied, modified or avoided statutory condition 7, as to material change in the risk, and s. 106(1) of The Insurance Act, R.S.O. 1937, c. 256, therefore did not apply to make the limitation void. In this view of the policy, statutory condition 7 was irrelevant. If, however, the condition was to be considered, there was nothing in the facts which precluded the insurer from relying upon the insured's failure to give written notice of the change, and the policy was therefore avoided under the statutory condition.

Per Kellock J.A.: It was not disputed that the change was one material to the risk, within the meaning of statutory condition 7, that it was within the control and knowledge of the insured, and that no notice in writing was given. The insurer was not estopped, nor could it be deemed to have waived compliance with the condition, by its failure to return, or offer to return, the unearned premium, since it was only after the giving of notice by the insured that any duty devolved upon the insurer in this connection, and there was no representation that the policy remained in force. Nor could the insured rely upon any silence there might have been on the part of the insurer.

AN appeal by the plaintiff from the judgment of Makins J., [1942] O.W.N. 571, 9 I.L.R. 431, [1942] 4 D.L.R. 538, dismissing the action. The facts are fully stated in the judgments.

8th February 1943. The appeal was heard by ROBERTSON C.J.O. and FISHER and KELLOCK JJ.A.

J. R. Cartwright, K.C. (R. Danis, K.C., with him), for the plaintiff, appellant: The respondent company had express notice, although not written notice, that the appellant had moved his house. He told the company's recording agent, Tallon, and although Tallon has stated that he did not communicate his knowledge of the change to his company, it is well established that a company is bound by the knowledge and acts of its recording agent: *Laverty on Insurance*, 1936 ed. at p. 279; *Peck v. Phoenix Mutual Insurance Company* (1881), 45 U.C.Q.B. 620.

General agents and recording agents are in the same position; they are empowered to issue policies and interim receipts, and to give oral coverings: 23 Canadian Abridgment, cols. 27 and 62; Wyman on Insurance, 1935 ed., p. 49; *The Ottawa Agricultural Insurance Company v. Sheridan* (1880), 5 S.C.R. 157. Since the respondent had express notice of a change material to the risk, it is estopped by its own conduct from saying that the contract became void. It elected to take its chances, and to keep the insured's premium. As the company kept the premium with full knowledge of the facts, it must be assumed that the policy remained in full force and effect. [ROBERTSON, C.J.O.: The appellant must invoke the doctrine of waiver or estoppel, since he is really obligated to give written notice of the change; and further, he must establish that the recording agent has power to make this waiver]. In this respect the agent was the company. [ROBERTSON C.J.O.: The want of written notice is a serious obstacle for you to overcome]. Our case is based on estoppel rather than waiver. Since the company elected to keep the premium, it cannot afterwards deny the existence of insurance: *Brunk v. Continental Casualty Company* (1938), 5 I.L.R. 93 at 102, [1938] 1 W.W.R. 283. [ROBERTSON, C.J.O.: The retention of the money is meaningless unless written notice is given.]

The precise point now before the Court has not arisen since the amendment to what is now s. 106(1) of The Insurance Act, R.S.O. 1937, c. 256. Where what has occurred (the moving of buildings and goods) is something which falls squarely within a statutory condition and it was so pleaded and proved, then if something in the descriptive part of the policy would have the effect of destroying the insurance in a way at variance with the statutory condition, the descriptive part would not apply by reason of the amendment in s. 106(1) of The Insurance Act: *The W. Malcolm Mackay Company v. The British America Assurance Company*, [1923] S.C.R. 335, [1923] 2 D.L.R. 506.

The learned trial judge found fraudulent exaggeration of the claim. It is submitted that there is no evidence to support such a finding of fraud. There was a further suggestion that the appellant behaved fraudulently in not disclosing the existence of insurance to the agent of another company in Kingston, to whom the appellant applied for insurance. But the appellant was then applying for insurance not on the building, but on the contents. There is no evidence of fraud, nor is there evidence that the non-

disclosure of the insurance with the respondent company to the said agent was material, or that it was a fraud on the respondent company. The onus of proving any such fraud is on the respondent. The trial judge had difficulty in accepting the validity of the appellant's proof of loss, but it is submitted that there was no evidence of fraud in such proofs. In any event, the onus is on the respondent to prove fraud and wilfully false statements, and no such proof was given or attempted by the respondent: *Adams v. Glen Falls Insurance Co.* (1916), 37 O.L.R. 1, 31 D.L.R. 166, particularly at p. 12.

The respondent proved at the trial that the moving of the cottage was a change material to the risk. As soon as the company has notice of such a change, then the company, in order to be relieved of liability, must comply with statutory condition 7, the provisions of which render the contract merely voidable, not void: *Kline Brothers and Company v. The Dominion Fire Insurance Company* (1912), 47 S.C.R. 252 at 254, 256, 9 D.L.R. 231. On the authorities and the pleadings, since the moving of buildings and goods was a change material to the risk, and the insurer did not comply with the condition, the appeal should be allowed and judgment entered for the plaintiff.

J. W. Thompson, K.C., for the defendant, respondent: The transfer of the building, with its contents, from the island to the mainland was a change material to the risk, and by virtue of statutory condition 7, the next step should have been taken by the appellant; otherwise, the insurance was avoided. Oral notice to Tallon was not sufficient. Once the policy has been issued, which is within the scope of the agent's authority, the statutory conditions apply, and they can only be waived or changed in writing (statutory condition 22). The cases upon which counsel for the appellant has relied do not refer to conditions made obligatory by the legislature; rather, they are conditions intended for the mutual benefit of the insurer and the insured. *Kadishevitz v. Laurentian Insurance Co.*, [1931] O.R. 529, [1931] 4 D.L.R. 401. There is a marked distinction between such a condition and a statutory condition: *Dubinski v. Stuyvesant Insurance Co.*, [1934] 3 D.L.R. 291 at 294, 42 Man. R. 145, 1 I.L.R. 186, [1934] 1 W.W.R. 669. It is submitted that statutory conditions are the governing factors, and they must be strictly construed. Since there was a change material to the risk, and no notice in writing was given, the appellant is confronted with an

insurmountable obstacle. There can be no waiver of the condition unless made as provided by statutory condition 22. There seems to be no case reported where there has been a waiver of the statutory condition except in writing: *Logan v. The Commercial Union Insurance Company* (1886), 13 S.C.R. 270; *The Atlas Assurance Company v. Brownell and Brownell* (1899), 29 S.C.R. 537; *The Commercial Union Assurance Company v. Margeson and Miller* (1899), 29 S.C.R. 601.

We are not estopped from setting up statutory conditions 2 and 22 as a defence. There can be no estoppel unless one of the parties to a contract has been misled into some act which he or she would not have done if it had not been for the conduct and representations of the other party. To adopt the words of the learned trial judge, to constitute an estoppel it must be not only pleaded but strictly proved. Mere silence does not create an estoppel: *Hyde v. Lefavre and Taschereau* (1902), 32 S.C.R. 474 at 479. There is strong reason to believe that when the appellant attended the office of another insurance company in Kingston he was well aware that his protection under our policy had been extinguished. With reference to the question of fraud, it is most difficult to establish facts with any degree of certainty, since everything was burned and there is no evidence available to prove whether or not the articles destroyed were in the building at the time of the fire, but the trial judge's finding of fraud is further borne out by the appellant's conduct on different occasions. The retention of the premium does not alter the fact that the insurance had lapsed: *Sikorski v. Continental Insurance Company*, [1933] 2 W.W.R. 388.

The respondent is entitled to succeed because: (1) there was a violation of statutory condition 7; (2) there was no notice given in writing by the insured, and no waiver as required by statutory condition 22; and (3) there was in effect an entirely new risk because of the transfer of the building with its contents.

J. R. Cartwright, K.C., in reply: The respondent seeks to distinguish between an ordinary condition and a statutory condition. The latter is merely a condition written into the contract by the legislature. Once such a condition is present, the contract is no different from any other, and statutory condition 22 as to the waiver of a statutory condition can be waived in the same way as any other condition in a policy: *Brunk v. Continental Casualty Company*, 5 I.L.R. 93 at 102, [1938] 1 W.W.R.

283. [ROBERTSON, C.J.O.: Why do you say the doctrine of estoppel is applicable, rather than that of waiver?] Estoppel exists because the appellant informed the company's recording agent of the change and since the premium was retained the appellant was lulled into security. The company had actual knowledge of the change in the risk by virtue of its agent's information.

Cur. adv. vult.

11th March 1943. ROBERTSON C.J.O.: This is an appeal from the judgment of Makins J., dated 6th November 1942, dismissing the action with costs. The action was brought upon a policy of fire insurance.

One Mrs. Eveleen B. Duquette, who was the owner of ten summer cottages and their contents, situate on Stanley Island in the River St. Lawrence, was insured against loss or damage by fire in respect of both the cottages and the contents, by a policy issued by respondent. Each of the cottages was separately described in the policy, and was covered for a specific sum, and the contents of each cottage were similarly dealt with.

Appellant purchased from Mrs. Duquette her leasehold rights of Stanley Island, together with the ten cottages and their contents, and on 28th February 1940, the policy of insurance was transferred to appellant with respondent's consent. Subsequently, in March 1940, appellant moved one of the cottages with its contents, over the ice from the island to the mainland, and set it up on posts, at a place called Summerstown. In the month of April 1940 appellant, with his family moved into the cottage, having brought there from Kingston, where he had been living, some additional household furniture. On 3rd June 1940, while appellant, with his family, was living in the cottage at Summerstown, the cottage and its contents were totally destroyed by fire. The risk was described in respondent's policy as follows:—"all direct loss or damage by fire or lightning, except as hereinafter provided; to the following described property while located and contained as described herein, and not elsewhere, to wit:" There then follows a list of the several cottages and contents, the cottage now in question being entered on the list, with its contents, as follows:—

"\$1,500.00—On the two storey, frame, metal roofed building, occupied as a summer dwelling—Known as No. 22.

“\$500.00—On Household Furniture only while contained in the last above described building.”

After this list the description continues as follows:—“All the property of the insured, situate on Stanley Island in the River St. Lawrence, Township of Charlottenburg, Province of Ontario.”

One of the questions that arises is whether, on the removal of the cottage and its contents from Stanley Island to the mainland, they continued to come within the description of the risk and to be covered by the policy.

A second question that arises is whether the policy was voided by clause 7 of the statutory conditions, if the first question is answered in favour of the appellant. In connection with the second question it will be necessary to consider other important facts appearing in evidence. I shall therefore proceed to consider the first question, with which these further facts are not concerned.

If it were not for an amendment made in 1929 to what is now subs. 1 of s. 106 of The Insurance Act (R.S.O. 1937, c. 256) there could be no question that under the description contained in this policy the property was insured only while located on Stanley Island, and that upon its removal therefrom it ceased to be within the risk. It had been held frequently that this result follows when the policy, in the description of the risk assumed, uses words, as here, that define and limit the risk, and an event occurs that makes the description of the risk no longer applicable to the property in question: *London Assurance Corporation v. Great Northern Transit Company* (1899), 29 S.C.R. 577; *Ross et al. v. Scottish Union and National Insurance Company* (1918), 58 S.C.R. 169, 46 D.L.R. 1; *The W. Malcolm Mackay Co. v. British America Assurance Company*, [1923] S.C.R. 335, [1923] 2 D.L.R. 506; *Sun Insurance Office of London, England v. Roy*; *Guardian Assurance Company of London, England v. Roy*, [1927] S.C.R. 8, [1927] 1 D.L.R. 17; *Moffa v. Law Union and Rock Insurance Co.* (1924), 26 O.W.N. 88; *Cooper v. Toronto Casualty Insurance Co.*, 62 O.L.R. 311, [1928] 2 D.L.R. 1007.

Subs. 1 of s. 106 of The Insurance Act now reads as follows:

“The conditions set forth in this section shall be deemed to be part of every contract in force in Ontario, except contracts where the subject matter of the insurance is exclusively rents, charges or loss of profits and shall be printed on every policy with the heading ‘Statutory Conditions’ and subject to the pro-

visions of section 110, no variation, omission or addition thereto shall be binding on the insured, nor shall anything contained in the description of the subject matter of the insurance be effective in so far as it is inconsistent with, varies, modifies or avoids such condition."

The last clause of the subsection, beginning with the words, "nor shall anything contained in the description" was added in 1929 by 19 Geo. V., c. 53, s. 12(1). It is suggested by appellant's counsel that this amendment was made because of certain observations of Middleton J.A. in the case of *Cooper v. Toronto Casualty, supra*. It seems entirely probable that this is so, but to what extent the Legislature intended to adopt the suggestion of Mr. Justice Middleton, and what effective alteration was made in the previous law on which he had commented, can be gathered only from the words that the Legislature used to express its intention.

Appellant's contention is that the words in this policy describing the subject matter of the insurance, and restricting it to "property while located and contained as described herein", that is, as to the cottage while situate on Stanley Island, and as to the household furniture while situate on Stanley Island and while contained in the cottage, are inconsistent with and vary or modify statutory condition 7, and are therefore ineffective by reason of the amended subs. 1 of s. 106.

The statutory condition is as follows:—

"MATERIAL CHANGE. 7. Any change material to the risk and within the control and knowledge of the insured shall avoid the policy as to the part affected thereby, unless the change is promptly notified in writing to the insurer or its local agent, and the insurer when so notified may return the unearned portion, if any, of the premium paid and cancel the policy, or may notify the insured in writing that, if he desires the policy to continue in force, he must within fifteen days of the receipt of the notice pay to the insurer an additional premium, and in default of such payment the policy shall no longer be in force and the insurer shall return the unearned portion, if any, of the premium paid."

This statutory condition is primarily for the benefit, or perhaps rather for the safeguarding, of the insurer. No doubt it contains something of value to the insured as well, but the purpose to which it is primarily directed is the safeguarding of the insurer against changes occurring after the contract is made, that add materially to the risk he has agreed to cover. A contract of fire insurance is no doubt a contract *uberrimae fidei*, that is, a contract in the making of which the utmost good faith is required on both sides. It is therefore essential that in the making of the contract the insured shall disclose to the insurer every material circumstance known to the insured. This is somewhat modified by the present statutory condition 1. A like duty to disclose matters material to the risk does not continue after the contract of insurance is made, unless the contract so provides. Changes may occur that materially increase the risk that existed when the policy was issued, and the insurer may know nothing of them, yet unless the contract provides otherwise, the insurer will continue to be bound so long as the change does not affect the property covered in such a way that the definition of the risk assumed becomes inapplicable: *Baxendale et al. v. Harvey* (1859), 4 H. & N. 445, 157 E.R. 913, per Pollock C.B. at p. 449; *Thompson et al. v. Hopper* (1858), El. Bl. & El. 1038, 120 E.R. 796, per Willes J. at p. 1049; *Pim and Rogers v. Reid et al.* (1843), 6 Man. & G. 1, 134 E.R. 784. The change increasing the risk may be by the act of the insured himself, and yet in default of a provision in the contract, he will be entitled to recover on the policy, unless indeed his own wrongful act is the cause of the loss: *Thompson v. Hopper, supra*.

Statutory condition 7 is intended to give to the insurer protection, upon terms deemed reasonable, against changes that, while not making the description inapplicable, make the risk assumed more hazardous than that existing when the contract of insurance was made. The change that is material to the risk need not be a change in location. It may be a change in the use of the property. Vacancy may be such a change. The storing of gasoline on the premises insured may be such a change. The removal of a farm house to a distance so that the barn which was insured is remote from any occupied house, has been held a change material to the risk. What is always essential, however, to the application of statutory condition 7 is a change material

to the risk in the sense that it increases the risk that the insurer assumed, and, subject to the condition, continues to cover.

It was said by Warrington J. (afterwards Lord Justice Warrington) in *Law Guarantee Trust and Accident Society v. Munich Re-Insurance Company*, [1912] 1 Ch. 138, at 153, to be "the general principle applicable in all cases of insurance that the obligation of the insurer is confined to the particular risk insured, and if the risk in respect of which a claim is made against the insurer differs from the risk he has insured, he is not liable to make good that claim." The matter is put in this way in the Hailsham edition of Halsbury's Laws of England, vol. XVIII, p. 444, s. 639: "The obligation of the insurers is confined to the particular risk insured: if therefore the risk is altered, their obligation ceases. . . . An alteration which does not affect the definition of the risk and make it inapplicable is not an alteration of the risk, even though it increases the danger and in fact causes the loss; and any such alteration may be made with impunity, unless expressly prohibited."

Applying these principles here, there is in the policy in question a description or definition of the risk, which includes the words applied to the property covered, "while located and contained as described herein, and not elsewhere". The property in respect of which a claim is made was removed by the insured to another location, so that it no longer came within the description or definition of the risk insured. This would be equally true and the result would be the same whether the new location was less, or whether it was more hazardous than the location stated in the policy. It is a simple matter of whether, at the time of the loss, the property destroyed by fire did or did not come within the description contained in the policy.

Now, if statutory condition 7 were not in the policy at all, and the policy contained no provision whatever for the safeguarding of the insurer against changes material to the risk, the result, under this policy, would be the same. The insurer would not be liable, for it had not agreed to insure this cottage or its contents while at Summerstown, but only while on Stanley Island. The removal of the cottage and its contents to Summerstown, therefore, was not a "change material to the risk" within statutory condition 7, for, so far as this property was concerned, it was then outside the risk as defined.

If it was the intention of the Legislature, in amending what is now s. 106(1) of The Insurance Act, to prevent an insurer from defining the risk it assumed in terms which contain such a restriction as there is in this policy, the words of the amendment are singularly inapt for the purpose. It is only by confusion as to the meaning and the purpose of the description of the risk, on the one hand, and of statutory condition 7, on the other, that it can be considered that this description "is inconsistent with, varies, modifies or avoids" statutory condition 7. The statutory condition is applicable, and is applicable only, to the risk as described in the policy, whatever the description may be. In no sense does the statutory condition purport to enlarge or extend the risk beyond that described. That is not its purpose. On the other hand, the question that arises on the description is whether or not the property in respect of which a loss is claimed was within the description of the risk at the time of the loss. With a description such as that now in question, if the location of the property has been changed after the issue of the policy, the question is, does the property still come within the description? It is not at all whether there has been a change to a more hazardous location. If the description is not answered, it matters not in the least whether the new location is less hazardous or more hazardous. It is only by the failure to distinguish the respective functions of these two essentially different parts of the policy, and the purposes they respectively serve, that the restriction as to location contained in this policy can be looked upon as inconsistent with or as varying, modifying or avoiding the statutory condition.

While it may have no legal consequence, it is of interest to note that this insured, the appellant, does not appear to have been misled in any way by the terms of the policy. He seems to have had enough appreciation of the nature of an insurance contract to know that the removal of the cottage and its contents to the mainland was important. Exactly what significance he attached to it may not be clear, but he was not left long in doubt. He met the agent who had issued the policy in question, and informed him of his intention to move the cottage to the mainland. Later the agent drove to Summerstown and inspected the cottage in its new location, and promptly informed appellant that he could not insure the cottage as it then was. This information was left with appellant's married daughter at the time of the

inspection, appellant being absent, but very soon he was in Cornwall and saw the agent himself, and was given the same information in person. The only dispute about this is that appellant says that what he was told was that no more insurance could be placed on the cottage. He admitted, however, that neither he nor anyone else had been talking of putting on more insurance, and the statement attributed by him to the agent would, therefore, have been senseless. In any event the trial judge preferred the agent's evidence to that of appellant, and appellant's daughter was not a witness. It must therefore be taken as established that appellant was informed as the agent states.

That appellant understood then, if he did not know before, that the policy no longer covered the cottage and its contents seems plain from the statements formally made regarding it in an action brought by appellant against Ocean Accident and Guarantee Corporation on two policies issued by that company on the contents of the cottage, one of them after the removal from the island. A question having been raised in that action by the Ocean Company with respect to further insurance not notified to it, the existence of which would affect the amount appellant would be entitled to recover from the Ocean company, appellant, through his counsel, definitely took the position that respondent's policy was not in force at the time of the fire so far as the contents of the cottage were concerned. This position was taken by appellant's counsel first on examination for discovery of appellant in the Ocean action, and again on the trial of that action. Appellant would seem to have understood that his property was insured by respondent only while on Stanley Island.

In its amendment in 1929 of what is now subs. 1 of s. 106, the Legislature may have had some purpose not relevant to statutory condition No. 7, but whatever was sought to be accomplished by the amendment, there is not to be found in it, in my opinion, anything that prevents effect being given to the description of the risk in the policy in question according to its terms.

With this view of the proper effect of the policy, statutory condition 7 is of no relevance to this case. If, however, my opinion as to the effect proper to be given to the terms in which the risk is described is not the right one, then the statutory condition must be considered. It is not disputed that, treating the

words of the description that relate to location as ineffective, the removal of the cottage and its contents from Stanley Island to Summerstown was a change material to the risk, within the meaning of the condition. Neither is it disputed that the change was within the control and knowledge of the insured, and that he did not give notice in writing to anyone of the change. The whole question is whether the insurer waived notice in writing or is estopped from setting up the want of notice in writing.

I do not think it necessary that I should go into the evidence relative to these matters. Some of the relevant facts I have already set forth in discussing the question of appellant's knowledge of the fact that the cottage and its contents were no longer covered by respondent's policy. Mr. Justice Kellock, in his reasons for judgment on this appeal, has also dealt with the matter in full detail. I say no more, therefore, on the matter than that I see nothing to prevent respondent relying upon the failure of appellant to give notice in writing of the change. Statutory condition 7, in that case, avoided the policy as to the property removed from Stanley Island.

The appeal should be dismissed with costs.

FISHER J.A. agrees with ROBERTSON C.J.O.

KELLOCK J.A.: This is an appeal from the judgment of Makins J., dated 6th November 1942, after a trial without a jury.

The action was brought by the appellant upon a certain policy of fire insurance upon a building in the sum of \$1,500, and upon the contents in the sum of \$500. The building and contents had been purchased by the appellant along with other buildings in January of 1940. At that time the building was located on Stanley Island in the River St. Lawrence, but in the month of March, the building and contents were moved by the appellant to the mainland, at a place called Summerstown. The policy in question had been issued by the respondent on the application of the former owner, and was assigned on 28th February 1940, to the appellant, this assignment being consented to on the same date by the respondent.

The respondent's agent, J. E. Tallon, who was a recording agent, had issued and countersigned the policy and also consented to its assignment to the appellant. Tallon says that after the building had been moved, he received a message from the

appellant to that effect, and told the appellant he would be down to see it as soon as the roads dried up. Tallon did not go down until some time in April, on his way to Montreal, but on this occasion he did not see the appellant or anyone on his behalf.

On either the 27th or the 28th of May 1940, Tallon says that, pursuant to an appointment made with the appellant, he visited the premises at Summerstown. The appellant did not appear but his daughter was there and Tallon told the daughter to tell her father that he could not insure the building until a foundation was put under it. There does not seem to have been any mention of the contents.

Within a few days, the appellant went to Tallon's office, where Tallon again told him that he could not insure it in the condition it was in, and the appellant said he was going to put a wall under it right away. Before anything further occurred, the fire took place, on 3rd June 1940, and the building and contents were destroyed.

The appellant had formerly lived in Kingston, and shortly after moving away from Kingston he reduced some insurance on his furniture and effects that he had had in Kingston in another company from \$1,000 to \$500 and he says that a portion of this furniture was also in the building in question at the time of the fire.

On 20th May 1940, he went to Kingston and took out an additional \$1,200 of insurance in the company in which he held the policy which had been reduced, so that at the time of the fire he had \$1,700 in the first company, namely, the Ocean, and \$500 in the respondent company on the contents in the destroyed building. At the time the appellant obtained the additional insurance of \$1,200 he made no mention to the agent of the Ocean company as to the \$500 which he was carrying with the respondent company.

I think it is reasonably clear on the evidence that the order of events is as above, and not that the appellant placed the additional \$1,200 of insurance on the contents of the building after having been advised of Tallon's attitude as to insuring the building in its then condition.

The appellant brought action against the Ocean company and has recovered 60 per cent. of the amount of the insurance on the contents of the destroyed building. In that action he

took the position, in the pleadings, that the policy sued on in this action was not in force. At the time of the trial of that action the writ in this action had been issued but not served.

The respondent set up a number of defences, but the only one with which I consider it necessary to deal is the defence that by reason of the removal of the building and contents, there was a change material to the risk, which was not notified in writing to the respondent or its local agent, as required by statutory condition 7, and that accordingly the effect was to avoid the policy. The respondent gave evidence to support this contention, and the learned trial judge has given effect to it. The appellant accepts the finding that there was a change material to the risk. Not all of the facts referred to above are relevant with respect to this defence.

For the appellant it is argued that as the respondent did nothing after learning through its agent Tallon that the building and contents had been moved, and did not return or make any offer to return the unearned portion of the premium, it is estopped from saying that the policy was not in force. The appellant admits that no written notice was given to the respondent by the appellant of the removal, but it is said that the respondent had express notice of the fact, and elected to retain the premium. I should have stated that the policy would have expired on 10th June 1940.

Statutory condition 7 is in these words: [see judgment of ROBERTSON C.J.O., *supra*].

It is to be noted that upon the occurrence of a change material to the risk, and within the control and knowledge of the insured, the policy is voided unless the insured promptly notifies the insurer in writing. The appellant gave no notice in writing as required by the condition. It is only when the insurer is "so notified" that any duty devolves upon the insurer. There is no obligation upon an insurer, apart from contract, to return the unearned premium once the risk has attached: *Ambler v. Factories Insurance Co.* (1920), 19 O.W.N. 95.

The appellant, therefore, is unable to establish any duty upon the part of the respondent to make any election, as he himself failed to comply with the requirement of the condition upon which alone the respondent would be obliged to do anything; nor can the appellant rely on any silence there may have been

on the part of the respondent: *Hyde v. Lefaiivre and Taschereau* (1902), 32 S.C.R. 474 at 479.

I am unable to see in the circumstances of this case anything upon which the appellant can rely as an estoppel. As I have already pointed out, in my opinion there was no representation by the respondent that the policy in question remained in force, either by reason of the retention of the unearned premium or by silence, if it could be said the respondent was silent. On the contrary, however, the respondent, through its agent, expressly told the appellant on two occasions that it could not insure the building in its then condition. I do not think it possible to construe this evidence except in one way. There being nothing in the evidence, therefore, to substantiate any estoppel, it seems unnecessary to refer to statutory condition 22.

My view being as above, I do not think it necessary to refer to any of the other points argued or dealt with by the learned trial judge.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff: Danis & Danis, Cornwall.

Solicitors for the defendant: Hughes, Agar & Thompson, Toronto.

[COURT OF APPEAL.]

Attorney-General of Canada v. City of Toronto.

Criminal Law—Disposition of Fines and Penalties—Prosecution Conducted by and at Expense of Dominion Government—Rights of Municipalities in Ontario—The Criminal Code, R.S.C. 1927, c. 36, s. 1036.

The fines, etc., "first mentioned" in s. 1036 of The Criminal Code, R.S.C. 1927, c. 36, which, according to the proviso to subs. 1 (enacted in 1922), go, in Ontario, to municipalities, are all fines as to which no other provision is made by any Dominion statute, except those included in clauses (a) and (b) of that subsection. It follows that where the costs and fees of counsel, witnesses, court criers, etc., are paid by the Dominion Government in a prosecution launched by it, "the cost of prosecution", within the meaning of clause (b), is borne by it, and it is entitled to the fines imposed. The fact that the municipality in which the trial is held bears the expense of keeping up the court house, and pays the salaries of sheriff's officers and constables who attend the trial, does not remove the case from the operation of clause (b). The fine, being within those contemplated by clause (b), is not one of those "first mentioned", within the meaning of the proviso, and is therefore not payable to the municipality under that proviso. *The Attorney-General of Nova Scotia v. The Attorney-General of Canada*, [1937] S.C.R. 403, applied.

AN appeal by the City of Toronto, defendant in the issues, from the judgment of Hope J., reported in [1942] O.R. 594, 78 C.C.C. 171, [1942] 4 D.L.R. 410. The facts are fully stated in the judgment appealed from and in the judgments now reported.

19th and 20th January 1943. The appeal was heard by ROBERTSON C.J.O. and FISHER, HENDERSON, GILLANDERS and KELLOCK JJ.A.

F. A. A. Campbell, K.C., for the appellant: As a result of the proviso added in 1922 to s. 1036(1) of The Criminal Code, R.S.C. 1906, c. 146, all fines mentioned in the first paragraph of that section, even including those reserved by clauses (a) and (b), should pass to the appellant, since it was the municipality bearing in part the expenses of administering the law under which the fines were imposed. It is submitted that the term "first mentioned", which appears in the proviso, refers to those fines which are without restriction. The legislature employed the said term designedly in contradistinction to fines secondly and thirdly mentioned in clauses (a) and (b). The history of the statutory provisions relating to this point, and resulting in the enactment of 1922, shows that the municipality in Ontario which bears the cost of such a prosecution as this, is entitled to the fines that may be imposed. It is significant that the legislature placed the proviso where it did; clauses (a) and (b) of s. 1036(1) have no application to Ontario, nor is the position of the appellant

altered by the provisions of s. 1037 of The Criminal Code, which is important in the other Provinces, but does not affect Ontario, which is entitled to these fines by virtue of s. 1036. There is no ambiguity in the section; the proviso clearly sets out the intention of the legislature, and such proviso should be examined to see if it is in fact a fresh enactment: 31 Halsbury, 2nd ed., p. 484, para. 605. The learned trial judge in his reasons for judgment cited the case of *The King v. Attorney-General for Ontario*, [1934] Ex. C.R. 25, 61 C.C.C. 359, [1934] 3 D.L.R. 483, wherein the Dominion claimed money to which it was clearly entitled under s. 133 of The Excise Act, R.S.C. 1927, c. 60, but the learned judge in that case usurped the powers of the legislature in attributing to s. 1036 an interpretation that it does not bear. The words of the section were not given their plain and obvious meaning, which is clearly that the municipality is entitled to the fines. The fundamental contention of the appellant is that the proviso nullifies everything which precedes it, so far as Ontario is concerned. It is submitted that the argument on this point is in strict accordance with the canons of construction of statutes: *Attorney General v. Governor and Company of Chelsea Waterworks* (1731), Fitzg. 195, 94 E.R. 716.

As to "the cost of prosecution": *Re Provincial Treasurer*, 67 C.C.C. 317, [1937] 1 D.L.R. 534, 11 M.P.R. 335, affirmed [1937] S.C.R. 403, 68 C.C.C. 177, [1937] 3 D.L.R. 225, is distinguishable. In the *Nova Scotia* case, it was apparent that the City of Halifax did not make any disbursements. In this case, the sheriff's officers and constables were paid by the appellant. It is true that the respondent here made certain payments, but surely it cannot gain an advantage by so doing since those costs are ordinarily met by the municipality.

[HENDERSON J.A.: Is there any guide in the *Nova Scotia* case as to what are costs of the prosecution?] Rinfret J. said that it implied a consistent course of action. To illustrate: the established custom was shown here by the sheriff sending a bill to the City of Toronto. The Administration of Justice Expenses Act, R.S.O. 1937, c. 141, s. 2, ss. (1) and (2), affords some assistance. It is submitted that ss. 9 and 11 of The Costs and Fees Act of Nova Scotia, mentioned in the *Nova Scotia* case, are not worded in the same way as our Administration of Justice Costs Act, *supra*. [ROBERTSON C.J.O.: Are you suggesting that we examine an Ontario statute in order to interpret the wording of s. 1036?]

[HENDERSON J.A.: Isn't there a complete answer to your argument at p. 412 of the *Nova Scotia* case (in S.C.R.)? The prosecuting counsel was retained by the Dominion—that does not mean the costs of the prosecution.] The corporation of the City of Toronto, the appellant herein, bore the expense in part of administering the law under which the fines, the subject matter of this action, were imposed or recovered.

J. C. McRuer, K.C., (*F. A. Brewin* with him), for the respondent: The prosecutions in this case were instituted by the Government of Canada. The first essential has been complied with to bring the respondent within clause (b) of s. 1036(1). In examining the proviso to s. 1036(1), introduced by the 1922 amendment, one must not lose sight of subs. 3 thereof, or of s. 1037. The proviso, which relates to Ontario only, gives the Province a statutory right which by subs. 3 the Lieutenant Governor in Council might have given to the municipality. The amendment gives to the municipalities a statutory right to the fines "first mentioned" in s. 1036, that is, those fines that do not come within clauses (a) and (b) of s. 1036. The fines in this case not coming under those "first mentioned", but under clause (b), the municipality has no right thereto, without an order of the Governor in Council under s. 1037. [ROBERTSON C.J.O.: It is the appellant's argument that all fines are mentioned in s. 1036, and that the only limitation is to be found in the opening sentence, commencing with the words "Whenever no other provision is made". If this is admitted, the construction would be that the legislature first mentioned all fines, and then made two exceptions for the benefit of the Dominion. It is my understanding that the respondent claims there are three classes of fines.] Yes, the section must be read as a whole, rather than in parts. [ROBERTSON C.J.O.: Do you say that the opening words of s. 1036 do not cover the fines mentioned in clauses (a) and (b)?] If the amendment in 1922 was intended to remove fines that formerly belonged to the Dominion, it would have said so in clear language. If it was the intention of the legislature that all fines were to go to the municipality it would have stated this intention plainly. It is apparent that the two classes of fines mentioned in subss. 2 and 3 were not to be affected. Nowhere could the respondent's position be set forth more emphatically than in *The King v. Attorney-General for Ontario*, [1934] Ex. C.R. 25, at 27-28, 61 C.C.C. 359, [1934] 3 D.L.R. 483. There is no suggestion

by the appellant in the case at bar that Ontario bore the ordinary costs of prosecution. [FISHER J.A.: What do the words "wholly or in part" mean, as used in the proviso?] It is not unusual to divide the costs. That question is governed by The Administration of Justice Expenses Act, R.S.O. 1937, c. 141. The Dominion undertook this prosecution, bore the burden of it, and if money is owing as a result, the respondent is most willing to pay it. The words "the costs of the prosecution" are also used in s. 1081(3) of The Criminal Code. It is submitted that the costs of prosecution are costs incidental to the prosecution of the case, as distinct from the costs of the general administration of the law, and that this distinction has been maintained throughout the history of s. 1036: *The Attorney-General of Nova Scotia v. The Attorney-General of Canada*, [1937] S.C.R. 403, 68 C.C.C. 177, [1937] 3 D.L.R. 225.

F. A. A. Campbell, K.C., in reply.

Cur. adv. vult.

12th March 1943. ROBERTSON C.J.O. and FISHER J.A. agree with KELLOCK J.A.

HENDERSON J.A. (*dissenting*):—An appeal from the judgment of Mr. Justice Hope dated 14th October 1942, after the trial of issues, to determine whether the appellant or the respondent is entitled to certain fines paid in respect of the conviction of a number of companies and one or two individuals who were convicted under s. 498 of The Criminal Code, R.S.C. 1927, c. 36.

The facts are stated in the judgment appealed from and the only point we have to determine is the true construction of s. 1036 of The Criminal Code.

In 1922 and prior thereto, s. 1036 of The Code was as follows:

"1036. Whenever no other provision is made by any law of Canada for the application of any fine, penalty or forfeiture imposed for the violation of any law or of the proceeds of an estreated recognizance, the same shall be paid over by the magistrate or officer receiving the same to the treasurer of the province in which the same is imposed or recovered, except that,—

"(a) all fines, penalties and forfeitures imposed in respect of the breach of any of the revenue laws of Canada, or imposed upon any officer or employee of the Government of Canada in

respect of any breach of duty or malfeasance in his office or employment, and the proceeds of all recognizances estreated in connection with proceedings for the prosecution of persons charged with such breaches or malfeasance; and

“(b) all fines, penalties and forfeitures imposed for whatever cause in any proceeding instituted at the instance of the Government of Canada or of any department thereof in which that Government bears the cost of prosecution, and the proceeds of all recognizances estreated in connection with such proceedings, shall belong to His Majesty for the public uses of Canada, and shall be paid by the magistrate or officer receiving the same to the Minister of Finance and form part of the Consolidated Revenue Fund of Canada.

“2. Nothing in this section contained shall affect any right of a private person suing as well for His Majesty as for himself, to the moiety of any fine, penalty or forfeiture recovered in his suit.

“3. The Lieutenant-Governor in Council may from time to time direct that any fine, penalty or forfeiture, or any portion thereof paid over to the treasurer of the province under this section be paid to the municipal or local authority if any, which wholly or in part bears the expenses of administering the law under which the same was imposed or recovered, or to be applied in any other manner deemed best adapted to attain the objects of such law and secure its due administration.”

By the statute of 1922, 12-13 George V (Dom.). c. 16, s. 8, the following amendment was enacted as a proviso to subs. 1:

“Provided, however, that with respect to the province of Ontario the fines, penalties and forfeitures and proceeds of estreated recognizances first mentioned in this section shall be paid over to the municipal or local authority where the municipal or local authority wholly or in part bears the expense of administering the law under which the same was imposed or recovered.”

I am of opinion that it is clear that the Government of Canada in this instance bore the costs of prosecution and that it is equally clear that the appellant bears, at least in part, the expense of administering the law under which the fines in question were imposed. In this connection I refer to *The Attorney-General of Nova Scotia v. The Attorney-General of Canada*, [1937] S.C.R. 403, 68 C.C.C. 177, [1937] 3 D.L.R. 225, where the

differences between these two provisions are discussed, and their effect is settled, by the Supreme Court of Canada.

I am sensible of the importance in dealing with the construction of a statute of paying attention to the exact wording thereof, not, on the one hand, to bring about a narrow construction of the language, nor, on the other hand, to import words not there, which would be legislating and not construing, and in my view all that we are called upon to determine is whether the fines in question come within the amendment of 1922 as being "fines, penalties and forfeitures and proceeds of estreated recognizances first mentioned in this section", *viz.*, s. 1036.

The fines, etc., first mentioned in s. 1036 are: "any fine, penalty or forfeiture imposed for the violation of any law", etc. In other words it appears to me that fines, etc., mentioned in clause (a) of subs. 1 of s. 1036 are fines, etc., secondly mentioned in s. 1036 and that fines, etc., mentioned in clause (b) of subs. 1 of s. 1036 are fines, etc., thirdly mentioned in s. 1036.

I do not know that more appropriate language could be found to indicate an intention, in respect of the Province of Ontario, to make a gift to the municipal or local authority in question of the fines, etc., referred to in the amendment.

Counsel discussed the history of the legislation and also the effect of s. 1037, but I do not find that this affords any assistance.

I would therefore allow the appeal with costs and direct that judgment be entered in favour of the Corporation of the City of Toronto, with costs.

GILLANDERS J.A. agrees with KELLOCK J.A.

KELLOCK J.A.:—This is an appeal from the judgment of Hope J., pronounced on 14th October 1942, after the trial of two issues directed to determine, as between the parties, who is entitled to certain fines paid in respect of the conviction of certain accused persons under s. 498 of The Criminal Code.

The facts sufficiently appear in the reasons for judgment of the learned trial judge, and I do not repeat them here. The question for decision involves the interpretation of s. 1036 of The Criminal Code.

In my opinion there are three classes of fines, penalties or forfeitures contemplated by subs. 1: first, those as to which "other provision is made by" some law of Canada apart from s. 1036; second, all others except those described in clauses (a)

and (b); and third, those described in clauses (a) and (b) themselves.

The contention made for the appellant as to the proper interpretation of the section is made up of several propositions. The first proposition is that the words with which the section begins, "Whenever no other provision is made by any law of Canada" are to be taken to mean "Whenever no other provision is made by any law of Canada other than the provisions hereinafter made by this section". In other words, appellant contends that the opening words of the section are to be taken to relate to provisions other than the provisions that the section then proceeds to make.

The second proposition is based upon the interpretation that the appellant places upon the proviso with which subs. 1 concludes. The appellant contends that to determine what fines, penalties or forfeitures come within the proviso, it is necessary to ascertain what are "the fines, penalties and forfeitures . . . first mentioned" in this section, and that they are all fines, etc., except only such as are excluded by the opening clause interpreted in accordance with its first proposition. In other words, the appellant says that the fines, etc., first mentioned in the section are those included in classes two and three above mentioned. The appellant contends that these fines, etc., are those included in the words "the same" that immediately follow the first mention in the section of a fine, penalty or forfeiture, and that they must include the fines, etc., later mentioned in clauses (a) and (b), for it was necessary, in order that these latter should not be payable to the Provincial Treasurer, to proceed to except them from "the fines, penalties and forfeitures . . . first mentioned", by an express exception. The appellant emphasizes the point that the words of the proviso are "first mentioned" and not "first disposed of", or other similar words designating different classes of fines, penalties and forfeitures, according to the several dispositions made of them. This may be a literal—perhaps a too literal—application of the expression "first mentioned in this section".

The appellant contends as a third proposition that in any event the fines here in question do not fall within the description in either clause (a) or clause (b).

Counsel for the respondent argues that the fines, etc., "first mentioned" in the section are those only which are included in

the second class mentioned above, and that the fines here in question fall within those described in clauses (a) and (b). The respondent's main reliance was placed upon clause (b). Little was said in argument with regard to clause (a). The respondent argues also that these two clauses, (a) and (b), constitute an "other provision" within the meaning of the opening words of the section.

Both counsel referred to the history of the section in support of their respective contentions. This history commences with 31 Vict., c. 1, s. 7(22), and flows on down through the following legislation:—49 Vict. c. 48, ss. 1, 2; R.S.C. 1886, c. 180, ss. 2, 3, 4; The Criminal Code of 1892, 55-56 Vict., c. 29, ss. 927, 928; 63-64 Vict., c. 46, s. 3; R.S.C. 1906, c. 146, s. 1036; 8-9 Ed. VII, c. 9, s. 2; 12-13 Geo. V., c. 16, s. 8; R.S.C. 1927, c. 36, s. 1036.

Looking to the history of s. 1036, one finds that prior to 1900 all fines, with the exception of fines as to which special provision was made, belonged to the Dominion, with a discretion on the part of the Governor in Council to direct their application within a field prescribed by the statute, including payment to a municipality. In 1900 the fines which the earlier legislation had given to the Dominion were thereafter directed to be paid to the Provincial Treasurer, with the exception of the fines described in clauses (a) and (b) of the present section, which were to continue to be payable to the Dominion. The Provincial Treasurer was, in turn, directed by the statute as to the disposition of fines payable to him. In 1909 this last-mentioned direction to the Provincial Treasurer was repealed, with the result that as the statute stood prior to the enactment of the proviso to subs. 1, in the year 1922, fines not otherwise specially provided for were payable to the Provincial Treasurer, with the exception of those mentioned in clauses (a) and (b), which were payable to the Dominion. By subs. 3 the Lieutenant Governor in Council was given a discretion as to payment over to a municipality or in some other way in furtherance of the object of the law under which recovery was had. S. 1037 continued in the Governor in Council the somewhat similar discretion with respect to fines to which the Dominion was entitled, which was in the legislation from the beginning.

The question arises upon the introduction of the proviso into the section in 1922, whether the intention of Parliament was to do more than, in the case of the Province of Ontario, to divert

from the Provincial Treasurer the fines formerly payable to him, and to give them directly to the municipality. If the intention were as Mr. Campbell now contends, s. 1037 would be left to operate in Ontario only with respect to such fines, if any, as are payable to the Dominion apart from s. 1036.

It seems to me that one derives little, if any, help from a consideration of the course of the legislation, but if one is justified in making any inference from the history of ss. 1036 and 1037, the effect, to my mind, is rather against the contention that the intention of Parliament in the 1922 amendment was to do more than to divert from the Provincial Treasurer of Ontario the fines formerly payable to him and give them to the municipality.

In my opinion the fines, etc., "first mentioned" in the section consist of those described in the second class above referred to. I think it is the fines, apart from those referred to in the opening words of the section, and with the exception of those which are described in clauses (a) and (b), which are the ones which are "first mentioned" in the section. Where a class of thing is described by general words, followed by an exception, the class described is the net remaining after the subtraction is made, and not the aggregate with which the description began. It would be true to say that it was the aggregate which was mentioned first, but the thing which was being described was not the aggregate, but the class of thing described by subtracting the exception from the aggregate. So in the case of this section I think that the class of fine which is first mentioned, in the sense of being described, is the class which remains after subtracting those described in clauses (a) and (b) from the general mass, consisting of all fines apart from those referred to in the opening words of the section. To read the section otherwise, would, in my opinion, give to the words "first mentioned" too narrow a meaning. That being my view, it is not necessary to deal with the conflicting contentions with regard to whether or not clauses (a) and (b) constitute an "other provision" within the meaning of the opening words of the section.

There remains to be dealt with the contention of the appellant that the fines here in question are not within either clause (a) or clause (b). In my opinion these fines are included in those described in clause (b). The only contest as to whether or not clause (b) is applicable centres around the words "the cost of prosecution". It is the appellant's contention that the Dominion

did not bear the cost of prosecution within the meaning of the clause, but Mr. Campbell concedes that unless he can distinguish the present case from the decision in *The Attorney-General of Nova Scotia v. The Attorney-General of Canada*, [1937] S.C.R. 403, 68 C.C.C. 177, [1937] 3 D.L.R. 225, he cannot succeed. He seeks to make a distinction upon the ground that no disbursements in connection with the prosecution had been made in that case, either by the Province of Nova Scotia or the Municipality of the County of Halifax, whereas in the present case the sheriff's officers and constables who were in attendance at the sittings of the Court at which the trials in question here took place, were paid by the appellant, although not particularly with regard to these trials alone. Mr. Campbell also rests this branch of his argument upon the fact that the appellant bears the expense of upkeep of the court house, and the general expenses connected with the administration of justice therein. It is admitted that the Dominion has paid the fees of counsel who conducted the prosecution, witnesses' and court crier's fees, as well as the fees of the sheriff and court constables and all other fees and expenses particularly referable to the prosecution, of which the respondent's solicitors could obtain an account.

In my opinion the principle of the decision which Mr. Campbell seeks to distinguish governs the present case, and the decision cannot successfully be distinguished.

This being my view with regard to the application of clause (b), it is unnecessary to consider whether or not the fines here in question also come within clause (a). In my opinion, therefore, the appeal fails, and should be dismissed with costs.

Appeal dismissed with costs; HENDERSON J.A. dissenting.

Solicitors for the plaintiff, respondent: McRuer, Mason, Cameron & Brewin, Toronto.

Solicitor for the defendant, appellant: C. M. Colquhoun, Toronto.

[COURT OF APPEAL.]

Bronson v. Evans and Evans.

Motor Vehicles—Negligence—Evidence—Statutory Onus—Proper Direction to Jury—Conflicting Evidence—The Highway Traffic Act, R.S.O. 1937, c. 288, s. 48(1).

It is misdirection to tell a jury, in a case where s. 48(1) of The Highway Traffic Act, R.S.O. 1937, c. 288, is applicable, that once the defendant has given an explanation, the burden is then on the plaintiff to meet that explanation by showing that the witnesses who gave it are not to be believed. The onus remains on the defendant throughout the trial, and is in no sense a shifting one. *Winnipeg Electric Company v. Geel*, [1932] A.C. 690, applied. It frequently happens that the evidence of witnesses, all of whom appear credible, varies greatly as to the circumstances of an automobile accident, and in such a case, if a doubt remains, the plaintiff is entitled to the verdict. *Ross v. Gray Coach Lines Ltd.* (1929), 64 O.L.R. 178, applied.

Motor Vehicles—Duty of Motorist in Approaching and Passing Standing Omnibus—The Highway Traffic Act, R.S.O. 1937, c. 288, ss. 15(3), 27, as amended.

When a passenger alights, at night, from a motor bus standing at the side of a highway in a country district, and while crossing the highway immediately afterwards, is struck by an automobile proceeding in the opposite direction, and the evidence is that the driver of the automobile, although he saw the bus, continued at a high rate of speed and without sounding his horn, the jury's attention should be drawn to ss. 15(3) and 27 of The Highway Traffic Act, and they should be told to consider whether or not something more was required of the driver in the circumstances. The presence of the bus should at once suggest the possibility of passengers getting on or off, and there is no law which, in these circumstances, removes the duty to take care from the motorist and places it entirely upon the pedestrian, even when the latter must cross the road to get to his home.

AN appeal from the judgment of Roach J., after the trial, before him and a jury, of an action under The Fatal Accidents Act, R.S.O. 1937, c. 210. The facts are fully stated in the judgments.

13th and 14th January 1943. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and KELLOCK JJ.A.

J. W. Pickup, K.C., for the plaintiff, appellant: The trial judge in effect told the jury that unless they disbelieved the defendants' witnesses they should find for them. He did not point out that the plaintiff's case was based upon a hypothesis involving inadequacy of recollection rather than deliberate lying [ROBERTSON C.J.O.: Is the law as well settled in civil as in criminal cases that the trial judge must put the theories of both parties fully and fairly to the jury?] I submit so; there is nothing in the cases to indicate any difference in this respect between civil and criminal trials: *Burman v. Ottawa Electric R.W. Co.* (1910), 21 O.L.R. 446 at 451; *Hadley v. Carolis* (1922), 22 O.W.N. 72 at 73;

Spencer v. The Alaska Packers Association (1904), 35 S.C.R. 362 at 373; *Ristow v. Wetstein et al.*, [1934] S.C.R. 128, [1934] 1 D.L.R. 787; *Rex v. West* (1925), 57 O.L.R. 446 at 450, 44 C.C.C. 109; *Rex v. Baugh* (1917), 38 O.L.R. 559 at 565, 569, 28 C.C.C. 146, 33 D.L.R. 191; *The Montreal Tramways Company v. Séguin* (1915), 52 S.C.R. 644 at 650, 28 D.L.R. 494; *Grant v. Burns*, [1932] 1 D.L.R. 740, 4 M.P.R. 322.

The charge to the jury was unfair to the plaintiff, in dealing much more fully with the evidence for the defendants than with that given for the plaintiff: *Bray v. Ford*, [1896] A.C. 44 at 49; *Campbell v. Prince* (1880), 5 O.A.R. 330 at 335; *Macdonell v. Woods* (1914), 32 O.L.R. 283 at 297-8, 20 D.L.R. 366; *Bustin v. W. H. Thorne & Co., Ltd.* (1906), 37 S.C.R. 532.

The charge was unsatisfactory as to the burden of proof, and did not comply with the principles laid down in *Winnipeg Electric Company v. Geel*, [1932] A.C. 690 at 695, [1932] 4 D.L.R. 51, 40 C.R.C. 1, [1932] 3 W.W.R. 49. [KELLOCK J.A.: If a trial judge tells the jury, both at the beginning and at the end of his charge, that the facts are for their determination, but expresses a strong view of his own, giving only one side, is that an "unfair" charge?] I submit it is.

I. Levinter, K.C., for the plaintiff, appellant: The rule as to the onus is that if the jury cannot come to a conclusion, then the plaintiff must succeed. Nowhere in this charge does the trial judge explain what the statutory onus means, and this is a clear case of misdirection.

A. W. S. Greer, for the defendants, respondents: The evidence for the defendants, if believed, completely discharged the statutory onus. The charge taken as a whole is fair, *i.e.*, not inaccurate and not such that the jury can be said to have been misled on matters of substance, so as to bring about a miscarriage of justice. If a charge is accurate as to the facts and the law, a trial judge is entitled to go to some length in expressing his opinion, providing he makes it clear to the jury that that is their province.

Under s. 27(1) of The Judicature Act, R.S.O. 1937, c. 100, a new trial is not to be ordered on the ground of misdirection unless there has been some substantial wrong or miscarriage of justice: *Storry v. C.N.R.*, [1941] 4 D.L.R. 169 at 174, 53 C.R.T.C. 71. The position is the reverse of that on a criminal appeal, and

here the onus is on the appellant to satisfy the Court that there has been a substantial wrong or miscarriage: *Brenner v. The Toronto Railway* (1907), 15 O.L.R. 195, 8 C.R.C. 100; *McKeown v. Toronto R.W. Co.* (1908), 19 O.L.R. 361, 9 C.R.C. 449.

As to the fairness and accuracy of the charge, see *Blue & Deschamps v. Red Mountain Railway Company*, [1909] A.C. 361 at 368, 9 C.R.C. 140. Unless there is an error in law or a misstatement of fact, a charge is not unfair: *The Ottawa Electric Railway Company v. Booth et al.* (1920), 63 S.C.R. 444 at 455, 60 D.L.R. 80, 29 C.R.C. 4; *Wells v. Lindop* (1888), 15 O.A.R. 695; *Ryan v. The Oceanic Steam Navigation Company, Limited*, [1914] 3 K.B. 731 at 751; *McAuliffe v. Hubbell*, 66 O.L.R. 349 at 354, [1931] 1 D.L.R. 835; *Fingland v. Brown and Garon*, [1943] O.R. 13, [1943] 1 D.L.R. 176.

J. W. Pickup, K.C., in reply.

Cur. adv. vult.

22nd March 1943. ROBERTSON C.J.O.:—An appeal from the judgment of Roach J., dated 23rd October 1942, at the trial of the action before him with a jury at Whitby. The action was brought under The Fatal Accidents Act, R.S.O. 1937, c. 210, by the father of the late Chester Bronson, a boy thirteen years of age, who was killed on provincial highway no. 2, by a motor car owned by the respondent, George N. Evans, and driven by his son, the respondent William Evans.

In answer to questions submitted to them the jury found that respondents had satisfied them that there was no negligence on the part of respondents, or either of them, which caused or contributed to the "collision," and that there was negligence on the part of the deceased boy, the particulars of which were: "Failing to observe traffic approaching from the west. Did not wait for bus to continue west so that he could get a clear vision of the traffic which might be approaching from the west."

The appeal is rested substantially on complaints of misdirection and non-direction in the charge of the learned trial judge to the jury. For the proper consideration of these matters it will be necessary to set forth some of the facts that appear in evidence.

The deceased boy and his father, the appellant, boarded at the Price House, which is on the south side of highway no. 2, a

short distance west of the scene of the accident. The boy had a job as delivery boy at a retail business in Whitby, which is several miles to the east. On the evening of 10th December 1941 the boy was returning home to the Price House by motor-bus, according to his usual custom. There was no fixed stopping place for the bus on this part of the highway, and the bus driver, at the boy's request, simply pulled over to the north side of the road and stopped while the boy got off, and then proceeded on his way. The door through which the boy alighted opened to the north side of the bus near the front end.

The respondent driver was travelling east from Toronto in his father's motor car at this time, and had with him another young man, named Osmond. This motor car struck the Bronson boy after he had alighted from the bus, and his dead body was found lying to the north side of the pavement by the occupants of the motor car, who ran back after the car was brought to a stop. I have not, for the moment, said anything about the evidence as to the exact place where the boy alighted from the bus, nor as to the place on the highway where he was struck, for there may be more than one opinion as to these things. The bus driver, who was called as a witness for the respondents, has made more than one statement as to where he stopped to let the boy off. No one saw the boy after he disappeared towards the rear of the bus on alighting, until the occupants of the motor car had a momentary glimpse of something in front of their left headlight, an instant before the boy was struck.

It is not disputed that it was the motor car driven by William Evans that struck young Bronson, and the provisions of subs. 1 of s. 48 of The Highway Traffic Act, R.S.O. 1937, c. 288, therefore apply, and the burden was on respondents of proving that his death did not arise through the negligence or improper conduct of respondents.

One important objection made by appellant to the charge, which was argued on the hypothesis that respondents' account of the accident is accepted, may be dealt with conveniently before discussing the more involved questions that arise when the other evidence is considered. William Evans was a witness at the coroner's inquest that was held soon after the occurrence. Before the trial came on he had gone overseas as an aircraftsman, and, by order of the Court, his evidence, given at the inquest, was permitted to be read at the trial as evidence for the defence,

although he had not been cross-examined at the inquest. There were also read at the trial, by counsel for appellant, certain questions put to William Evans on examination for discovery, and his answers thereto. According to William Evans, he was driving east on the south side of the highway, at a speed of about 45 miles per hour, when he observed a bus of the Toronto Transportation Commission headed in the opposite direction, about 75 yards to the east of him. The bus, he says, was standing still. Evans lowered the beam of his headlights and, without altering his speed or sounding his horn, passed the bus, which he says was just pulling away as he passed it. At that moment he saw a dark object which shot out very quickly from behind the bus. There was an impact before he had time to apply his brakes, and after he had proceeded a short distance and stopped his car, he came back and found the body of the boy on the north shoulder of the road.

At the trial, counsel for appellant, among his objections to the charge, called attention to the fact that the learned trial judge had not put to the jury the view that when a motorist is approaching a standing bus, it is his duty to approach with care, and to blow his horn or to slacken speed, as some one might come out from behind the bus. Counsel put that forward as something the jury ought to consider. No such direction was given.

In my opinion some such direction should have been given, more particularly in view of the quite definite suggestions made in the course of the charge as to the matters the jury might accept as discharging the onus that lay upon the respondents. A passenger omnibus, recognized as such by William Evans, at a stand-still on the side of the highway, in a farming district, would suggest at once the probability of passengers getting on or off—which it was could not be told on a dark night, such as this was. Evans saw the bus when he was 75 yards away, yet he continued on at 45 miles per hour, and gave no warning. More than that, he deflected the beam from his front lights, so that they did not shine so conspicuously. There are no sidewalks at this place—nor generally upon this highway where it passes through country parts—and pedestrians, especially in winter, must take to the roadway. I do not know of any law that removes the duty to take care, in such circumstances, from the motorist and places it wholly upon the pedestrian, even when

he must cross the road to his home. I think the learned trial judge should have called to the attention of the jury the requirement of s. 15(3) of The Highway Traffic Act that "Every motor vehicle . . . shall be equipped with an alarm bell, gong or horn, and the same shall be kept in good working order and sounded whenever it shall be reasonably necessary to notify pedestrians or others of its approach," and the provisions of s. 27 of the same Act (as re-enacted by 1939, c. 20, s. 6, and amended by 1941, c. 22, s. 6), which provides that every person who drives a vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway shall incur certain penalties; and that he should have instructed the jury to consider whether, in the circumstances here, present, something more was not required of the respondent driver. What I conceive to be a defect in the charge in this respect becomes something more than non-direction. The learned judge said to the jury, "If you believe Evans, the driver, and Osmond, who was with him, then how did the accident happen? It happened by reason of the fact that the boy did suddenly emerge from behind the bus into the path of the motor car, and the motorist had no opportunity to avoid him." Having it in mind that the evidence of speed undiminished from 45 miles per hour, and of the omission to sound the horn, although the driver of the motor car was fully aware that he was approaching and passing an omnibus that had come to a stop at the side of the highway, is all to be found in the evidence of Evans, the driver, the statement I have quoted from the charge appears to amount to actual misdirection and a withdrawal from the jury of a matter that was for their determination: *Ristow v. Wetstein et al.*, [1934] S.C.R. 128, [1934] 1 D.L.R. 787. It is further to be noted how clearly this direction of the learned judge is reflected in the answers of the jury.

It is necessary for the consideration of the next objection to the charge, that I should say something further of the course of the trial, and of the nature of the evidence. Appellant pleaded and always relied upon subs. 1 of s. 48 of The Highway Traffic Act, placing the burden of proof upon respondents. A number of witnesses were called in the plaintiff's case in chief, who gave evidence of matters that might be considered to be inconsistent with the explanation of the accident put forward in the statement of defence, but nothing was done to relieve the defence of

the statutory onus. None of the witnesses called for the plaintiff were in any sense eye-witnesses of the accident. So far as their evidence had relation to the accident, and the place and manner of its occurrence, it consisted of evidence of what was found upon the highway and close to it after the accident had occurred. The appellant and the man who kept the Price House, where he and his son had boarded, and a number of others, made a search of the ground on the same evening and on the next day, and gave evidence of what they found. It is unnecessary for the present purpose to go into the details of this search. The driver, Evans, said that prior to and at the time of the impact his car was travelling in the middle of the south half of the pavement, and that it did not swerve at all at the time of the impact, and that he then pulled up on the south shoulder of the road. The boy's body was found on the north shoulder of the road, as already stated. Appellant and his witnesses gave evidence of finding a number of things also on the north side of the road, or on the north shoulder. Among them were a rubber heel off the boy's boot, a trouser clip (the boy used a bicycle in making deliveries in Whitby) and a glove, pieces of glass, apparently from the left front headlight of the car, which was broken, and pieces of metal from the broken grille in the front of respondents' car. Perhaps a more significant thing was a trail of water or anti-freeze along the north side of the pavement from a point west of where the body was found, easterly to that point, and then diagonally across to the south side to where respondents' car stood after the accident and where a pool had formed. There is evidence that the radiator of the car was broken in the accident, and that all the anti-freeze leaked out of it. There was mention also of certain skid-marks on the pavement, which, if referable to the respondents' motor car, might be inconsistent with the evidence for the defence.

Appellant put in this evidence, not, I take it, for the purpose of establishing where or how the accident occurred, but rather to establish facts in relation to the accident that were not consistent with or that cast doubt upon respondents' account of it. As it is undesirable to discuss the evidence, in the event of a new trial, further than is necessary to a proper statement of the reasons for judgment on this appeal, I shall say no more than that, if accepted, the evidence of these witnesses might have been considered by a jury to create a doubt whether the respondents had

satisfied the burden upon them. For the defence, witnesses were called who were also at the scene of the accident soon after it occurred, and who said they saw no such evidences on the ground as appellant's witnesses deposed to, and in some instances the respondents' witnesses went farther and said there were no such things there. The credibility of the witnesses on one side or the other or the weight of their evidence are not matters for this Court. It is sufficient to say that respondents' counsel, in answer to a question by the Court in the course of his argument, whether he went so far as to say that the evidence of appellant's witnesses as to physical evidence said by them to have been found on the ground, was of so little value, either because of the character of the witnesses, or because of the want of significance in the matter they deposed to, that it ought to be disregarded, admitted that he did not take that ground, although he strongly contended that a jury ought not to accept it as against the evidence for the defence. Substantially, it comes to this, that it was for the jury to say what evidence they believed and what its proper value was in arriving at a conclusion whether the defence had satisfied the onus.

The learned trial judge put the case to the jury in a manner that is new to me in actions of this character, where the statute casts the burden of establishing no negligence on the defence. It is well settled that in such a case the burden of proof remains on the defendant until the very end of the case, and it is upon the whole of the evidence that the defendant must satisfy the jury that the accident was not in fact caused by his negligence: *Winnipeg Electric Company v. Geel*, [1932] A.C. 690, [1932] 4 D.L.R. 51, 40 C.R.C. 1, [1932] 3 W.W.R. 49. The learned judge no doubt told the jury in general terms what it was right and proper that they should be told in this regard. He then proceeded, however, to discuss the manner in which they should approach the case in hand, and the method by which they might reach a conclusion whether the respondents had satisfied the burden that was on them, and in that part of his charge, which was the major part of it, I am forced to the conclusion that there was grave misdirection.

The learned judge, after some more or less general instructions to the jury, proceeded as follows: "There are two propositions, so to speak, put to you as to the manner in which the collision between the motor car and the boy occurred. For the

plaintiff this proposition is put to you, that, having regard to the articles which were found, as they say, on the north half of the road or on the north shoulder, and having regard to the skid marks to which reference has been made, and the alleged dripping of anti-freeze and blood-marks on the north side of the road, the proposition put by the plaintiff, as I followed Mr. Levinter in his argument, was that that leads to the inescapable conclusion that the collision occurred on the north side of the road. The defence puts this proposition to you, namely, that the collision did not occur on the north side of the road, it occurred on the south side of the road. True, the defendants say, the body was later found on the north shoulder, but the actual impact occurred at the moment when the boy suddenly emerged from behind the bus into the path of the motor car, which was then on its own side of the road. Now that is the defendants' submission to you. You have got two opposing theories or propositions."

The learned trial judge then proceeded to say that the evidence fell into two headings; First, the eye-witnesses, and, secondly, those who were not present, who did not see but made investigations later. He then continued as follows:—

"Mr. Levinter said to you that if you answer question No. 1, 'No, the defendants have not satisfied us,' you are not thereby saying that those who saw and swore before you as to what they saw were liars. Well, let us see. You are seeking the truth, and I am anxious that you should find it. If you believe Evans, the driver, and Osmond, who was with him, then how did the accident happen? It happened by reason of the fact that the boy did suddenly emerge from behind the bus into the path of the motor car and the motorist had no opportunity to avoid him. If for some reason you say, as it is your privilege to do if you wish to, 'We do not believe them, and we do not believe Hill,' then the defendants in that set of circumstances have left you without any explanation by anyone who was an eye-witness. Evans was not here to give his evidence, for the reason that was stated, namely, that he is now in the army in England—or in the Air Force, I think; but you heard his explanation given under oath, the result of questions put to him by the Crown Attorney of this county at the inquest. You did see Osmond and Hill, and had the opportunity of determining in your own minds whether those men ought to be believed or ought not to be believed.

Each one of them made an impression upon you—good, bad or indifferent, I don't know—but I suggest to you that if you believe them, there is the explanation of how this accident occurred, notwithstanding that articles were found on the north side of the road. So I suggest to you men that in reaching a conclusion you should each one of you say to yourself, 'Do I believe Evans? He is not here, but I heard his evidence given under oath in another place. Do I believe Osmond, the soldier boy who gave evidence, and Hill?' And if you answer that question which you put to yourself by saying, 'Yes, I believe them,' then put another question to yourself: 'Is there something anywhere else in the evidence that would justify a conclusion by me that those men were not telling the truth? And if there is something else somewhere else in the evidence, then perhaps I should revise my opinion with respect to Evans, Osmond and Hill.' "

I have made this lengthy quotation from the charge because it contains the keynote of the whole charge. The learned judge proceeded to discuss, at some length, details of the evidence, and then returned to his first theme, saying: "I come back to the point from which I started, that the onus rests on the defendants, and if you believe Evans and Osmond, then perhaps you will say they have satisfied the onus."

In my opinion it would be unfortunate if the formula recommended by the learned trial judge should be adopted as proper to be followed by either judge or jury in solving the problem presented in cases of this character. It offends against both propositions I have referred to as established in *Winnipeg Electric Company v. Geel*, *supra*, and in numerous other cases before and since that decision. Instead of treating the burden of proof in this case as one that remains on the defendant throughout, and is not removed even if the plaintiff should give no evidence whatever of negligence, it is treated in the charge as a shifting onus, and as if, once the defendant has given an explanation, the burden is then upon the plaintiff to meet it by showing that the witnesses who gave the explanation are not to be believed. That puts a burden on the plaintiff that is not intended by the statute, s. 48(1) of The Highway Traffic Act. The defendant must satisfy the jury, upon the whole evidence, that there was no negligence on his part. If a doubt remains, the plaintiff is entitled

to the verdict: *Ross v. Gray Coach Lines Ltd.*, 64 O.L.R. 178, [1929] 3 D.L.R. 841.

It is common experience that witnesses whose honesty and intention to tell the truth are not questioned will disagree on vital matters in relation to the incidents of a motor car accident. Witnesses, all of whom appear to be credible, will disagree violently as to which side of the road they were respectively travelling upon. On several occasions appeals have come to this Court from a trial judge who has found himself wholly unable to decide with whom the fault lay because the witnesses on both sides all seemed to him to be worthy of belief, although they were in direct conflict. *Coupland v. Marr*, [1931] O.R. 707, is an example. A motor car accident usually happens so quickly and so unexpectedly that there is great chance of error in the observation of it and in the account of it by the most honest witness. Another circumstance that indicates the propriety of caution in accepting at face value the evidence of the driver of a car that has caused the death of a pedestrian, is that the other side of the story cannot be told. In the case of this unfortunate boy, if his story of the event could be told, it might clear up some matters that are unexplained, and absolve him from the negligence that the jury have attributed to him.

The evidence of the witnesses Osmond and Hill in the present case affords excellent examples of the not uncommon frailty of witnesses, presumably honest, in regard to matters of which they speak with assurance until cross-examined. Evans was not present at the trial and, therefore, was not cross-examined. A jury could not judge of his character as a witness by listening to the reading of his evidence given at the inquest. Osmond, on his examination-in-chief, corroborated generally, although not always, the evidence of Evans. In his examination-in-chief he said that as they approached the bus and were about four car lengths to the west of it, the bus was pulling on to the shoulder and he saw it stop. He said that the bus stopped when they were about a car length west of it. It is obvious that if he was right about this, the car, travelling at 40 or 45 miles per hour, would have passed the bus before the boy alighted, and certainly before he could possibly have alighted and run to the rear of the bus, and then behind it into the path of the motor car. That is not, however, the most glaring defect in Osmond's evidence. On cross-examination Osmond displayed such uncertainty, par-

ticularly in regard to where the bus was when he first observed it, that the trial judge put the following question to him and had the following answer:

"HIS LORDSHIP: Q. Just a minute. Then do I correctly understand you, witness—listen to me—that you are not sure whether the bus was pulling to a stop, was stopped, or was just pulling away when you first paid any attention to it? A. Yes, Sir."

A jury, charitably inclined, might conceivably still regard Osmond as a witness who did not wilfully intend to mislead when he made the statements I have quoted from his examination-in-chief, but he was certainly not a witness whose evidence on the vital circumstances of this case should be recommended to the jury as furnishing a satisfactory explanation of the accident.

The evidence of the witness Hill was coupled with that of Evans and Osmond by the learned trial judge, as affording a satisfactory explanation of the accident, if the jury believed them. Hill was the driver of the omnibus. He was not the regular driver on this route. It was a question of some importance in the trial, whether the Bronson boy had got off the bus a short distance to the west of the place where his body was found after the accident, or whether the boy had alighted a considerable distance to the east of that place and was walking westerly along the road when he was struck by the car. Hill's evidence was important on this matter. At the trial he said that he stopped and let the boy off "approximately 75 to a hundred feet east of the Carveth Drive." The Carveth Drive is 150 or 160 feet west of where the body lay, and the place where the boy got off, according to this evidence, would be from 50 to 75 feet west of where the body lay. At the inquest held a few days after the accident, when, as Hill admits, his memory of the event was better, he said he stopped to let the boy off "just east of the Pickering Beach Road." The Pickering Beach Road is some hundreds of feet further to the east, and if the boy alighted from the bus there, as Hill at the inquest swore he did, then the accident did not happen in the manner described by Evans.

Hill also made his contribution to the varying accounts given by respondents' witnesses of the situation as respondents' car approached the bus and immediately before passing. I have already referred to what Evans and Osmond said about it. Hill says that he first saw the motor car appearing in front of him

slightly after he had started up (after letting the boy off), and he says he pulled away as speedily as possible. It was progressing towards him and was "about fifty to a hundred feet or possibly a little bit more" from the front of the bus. At the inquest he made this distance "about a block." This statement made by Hill at the inquest as to the car being distant "about a block" when the bus pulled away, is significant, not only as indicating, if it were true, the impossibility of Evans's explanation that the boy ran out from behind the bus right in front of the motor car, but also when considered with his other statement at the inquest that he stopped and let the boy out east of the Pickering Beach Road.

When he was being pressed at the trial in regard to another inconsistency in his statements, Hill offered as an explanation the following, "Well, that is the way I talk all the time; I never talk definitely about anything very much."

Nothing whatever was said by the trial judge to the jury in commending to them the explanation of the accident given by respondents' witnesses in regard to these inherent difficulties in the way of accepting it. On the contrary, it was commended to the jury as consistent and complete, if the jury thought they were witnesses to be believed. The jury were recommended to consider the other evidence to see whether they should revise their opinion with respect to Evans, Osmond and Hill, and to justify the conclusion that these men were not telling the truth.

When it is considered how necessarily one-sided the available evidence of eye-witnesses in a case like the present must be, because the boy who alone could tell the story from his viewpoint is dead, the wisdom of maintaining the statutory onus at the level fixed by many decided cases is obvious. To tell the jury first to make up their minds whether the defendant and his witnesses are worthy of belief, and then to consider any physical evidences of the occurrence in their bearing upon the credibility of the witnesses for the defence, is not a full compliance with the statute. No doubt these things are to be taken into account, but a jury has not discharged its duty by determining merely that it has an explanation from witnesses whom it takes to be honest. There may be evidence given by other witnesses, equally credible, of facts that while they do not disturb the opinion that defendants' witnesses are honest, raise doubt whether their explanation is complete, or discrepancies and con-

traditions in the evidence of defendants' witnesses themselves may raise a doubt as to the accuracy or scope of their observation, notwithstanding their sincerity. All this, in my opinion, the trial judge put aside, and on that ground also I consider the charge open to the objection taken.

There were other matters objected to that deal rather with details of the evidence, and I do not think it necessary to deal with them. I am not to be taken, however, as disregarding them as unimportant and not deserving of consideration.

Upon the grounds I have stated my conclusion is that the appeal must be allowed and a new trial directed. Appellant is entitled to costs of the appeal, and the costs of the former trial should be to the appellant in the cause.

GILLANDERS J.A. (*dissenting*):—An appeal by the plaintiff from a judgment dismissing his action after trial before a judge and jury on the ground of non-direction and misdirection. The action was brought under The Fatal Accidents Act by the plaintiff for damages for the death of his son, thirteen and a half years old, who was struck by a motor car owned by one of the defendants and driven by the other.

Some facts are not in dispute. The deceased boy worked in a grocery store in Whitby and lived with his father at a boarding-house on the south side of King's Highway no. 2 about four miles west of that town. On the evening of 10th December 1941, between six and seven o'clock, he boarded a bus at Whitby and was let down in the vicinity of his boarding-house on the north side of the highway. After he got off the bus he was struck and killed by an eastbound motor car driven by the defendant William Evans. Under these circumstances the onus of proof that the damage did not arise through the negligence or improper conduct of the driver of the motor car was on the defendants under s. 48(1) of The Highway Traffic Act.

The explanation of the defendants rested in the main on the evidence of the defendant William Evans, the driver of the motor car, and that of a passenger who was riding in the front seat with him.

At the time of the trial the driver was on military service out of Canada, and a motion for the adjournment of the trial on this account had been denied, but an order was made permitting his evidence, given at the inquest, to be read into the

record. His story was, in short, that he was driving easterly on the highway on his way home when he noticed a Gray Coach Lines bus stopped facing west partly on the pavement and partly on the north shoulder of the road. When the motor car and bus were meeting or approximately opposite each other the bus started up to continue westerly, and the deceased boy appeared, moving quickly from behind the bus into the path of the defendant's car, which then was only some fifteen to eighteen feet west of him. The boy was struck by the left front of the car. The defendant driver brought the car to a stop a little to the east on the south side of the road.

Riding in the front seat with the driver was a young man who testified at the trial. He did not actually see the deceased boy before the impact, but he saw the bus, and as the car passed the bus this witness said he drew his eyes back to the road, and that there was what he termed a "break" in the left headlight beam and "just a sickening crash right immediately after the break."

No witnesses who had seen the accident were called for the plaintiff, but considerable evidence was given from which it is urged it should be inferred that the accident did not occur as indicated by the defendants' evidence. This evidence indicated the location of the deceased boy's body on the north shoulder of the road and the finding of a number of articles and marks which might indicate that the accident occurred on the north part of the highway rather than the south. There was evidence of skid marks some forty feet in length going from the south side of the road diagonally across to the north side; and of the finding, either on the north side of the highway or on the north shoulder, of the heel of the deceased boy's shoe; of a bicycle trouser clip; of one of the boy's gloves; of pieces of glass said to have come from the broken left front headlight of the defendant's motor car; of some pieces of metal said to be from the broken radiator grille of the defendant's car, and of spots of blood and water or anti-freeze west of where the body was found and easterly in the direction in which the car stopped.

There was no dispute as to the location of the boy's body on the north shoulder, or of the fact that the left front headlight glass had been broken and the radiator of the car damaged by the impact, and leaking.

Evidence was given by police officers and a doctor who was called, which might be taken to cast some doubt on the finding or location of some of these marks and as to whether the skid marks referred to had been caused by the defendant's car.

Briefly, the theory of the plaintiff was that the deceased boy was not crossing the road immediately behind the bus when struck, but was hit by the defendant's motor car on the north half of the highway and that the bus could not at the time have been in a position to obstruct the defendant driver's view; that it could not have happened in the manner indicated by the defendants, and that in these circumstances the defendant had not satisfied the onus cast upon them.

The questions put to the jury on liability, and their answers thereto, were as follows:

"1. Have the defendants satisfied you that there was no negligence on their part or on the part of either of them which caused or contributed to cause the collision? A. Yes.

"2. Was there any negligence on the part of the deceased boy which caused or contributed to cause the collision? A. Yes. Failing to observe traffic approaching from the west. Did not wait for bus to continue west so that he could get a clear vision of the traffic which might be approaching from the west."

The jury then assessed the damages at \$2,500.

On these answers judgment was entered dismissing the action. The appeal is based on the charge to the jury. Appellant urges that the learned trial judge in charging the jury (1) failed to place the plaintiff's case and contentions before the jury and unduly prejudiced the plaintiff's case by his charge in favour of the defendants; (2) usurped the functions of the jury on questions of fact; (3) in effect told the jury that in order to render a verdict for the plaintiff they had to disbelieve certain witnesses; (4) showed bias, and (5) did not adequately charge the jury on the question of onus.

Probably the main objection urged by appellant was that the case put to the jury was in effect that if they believed and accepted the evidence of the defendant driver and his passenger that was an answer to the plaintiff's claim and discharged the onus resting on the defendants. It was argued that this was in substance the question that was put, and that so putting it amounted to withdrawing from the jury the question whether

even in that event the defendants had satisfied the jury that they were not at fault.

In this connection exception is taken, *inter alia*, to the following portions of the charge: [see the passage commencing "Mr. Levinter said", *supra*, p. 256].

Conceding that these and other portions of the charge indicate what the opinion of the learned trial judge might be on a question of fact, it should be noted that they fall short of being a direction in law that if the evidence of the witnesses mentioned is accepted, that is an answer to the case. It is obvious that the evidence indicating that the deceased boy came out hurriedly from behind a bus into the path of the defendant's car is in material conflict with the theory of the plaintiff that the boy was struck on the north side of the road, presumably after the bus had passed on to the west and was not a factor in the accident. The question whether on all the evidence the accident did or did not happen in the manner described by the defendant driver was an important one to consider. The extent to which the trial judge goes is to "suggest" that if the jury believed the witnesses mentioned "there is the explanation of how the accident occurred", and to say: "if you believe Evans and Osmond then perhaps you will say they have satisfied the onus." Further, one should not divorce one part of the charge from the rest. Near the outset the learned judge charged the jury specifically that the onus was on the defendants to satisfy them as reasonable men that the defendant driver was not to blame, and that he acted as a reasonably prudent man at the time and place in question; that they were the sole judges of the facts, and that their finding should be based on all the evidence; and, later, after commenting on the evidence, he said:

"Now, because I have made reference to some parts of the evidence and not all of it, you are not to assume that the parts to which I made no reference are not important. In your mind they may be far more important than parts to which I have referred. Do not consider that anything I have said to you is a direction to you as to what your finding should be. I am anxious that you should analyze all this evidence very carefully, and if you think I have expressed an opinion concerning this case and you differ from it, throw aside my opinion if it is in conflict with your own, because you are the supreme judges; I have nothing to do with the facts."

It is further urged that there was failure to place the plaintiff's case and theory of the accident properly before the jury. In this connection the following portions of the charge should be noted and kept in mind:

"The plaintiff's son was a pedestrian on the highway, and, by reason of that fact, in this action the burden of proving to your satisfaction that his death was not the result of negligence on the part of the motorist rests on the shoulders of the motorist. That is provided by The Highway Traffic Act, to which Mr. Levinter in his address referred, and that is something of which you cannot afford to lose sight in the course of your deliberations, namely, that these defendants must satisfy you that the driver of this motor car was not to blame. Satisfy you to what extent? Satisfy you as reasonable men. . . .

"That the boy met his death as a result of being struck by the motor car there is no doubt. He died, I daresay, almost instantaneously, according to the medical evidence. And there are two propositions, so to speak, put to you as to the manner in which the collision between the motor car and the boy occurred. For the plaintiff this proposition is put to you, that, having regard to the articles which were found, as they say, on the north half of the road, or on the north shoulder, and having regard to the skid marks to which reference has been made, and the alleged dripping of anti-freeze and blood marks on the north side of the road, the proposition put by the plaintiff, as I followed Mr. Levinter in his argument, was that that leads to the inescapable conclusion that the collision occurred on the north side of the road. The defence puts this proposition to you, namely, that the collision did not occur on the north side of the road, it occurred on the south side of the road. True, the defendants say, the body was later found on the north shoulder, but the actual impact occurred at the moment when the boy suddenly emerged from behind the bus into the path of the motor car, which was then on its own side of the road. Now, that is the defendants' submission to you. You have got two opposing theories or propositions."

And yet again:

"It is said, more or less by way of reply, I suppose, or in anticipation of what the defendants were going to say, at least it was put to you by Mr. Levinter in argument, that the bus had nothing to do with it, that it had gone on its way."

It is further urged that the jury should have been invited to consider whether, even if the accident happened in substantially the manner alleged by the defence, yet by failing to reduce his speed or to prove affirmatively that he had sounded his horn as he approached the bus, the defendant driver had failed to satisfy the onus resting on him. This objection was among the exhaustive objections to the charge taken by plaintiff's counsel at the trial.

The evidence of the defendant driver, read into the record, indicated that he was driving at a speed of about 45 miles an hour; that the night was black and the road good. The passenger who was riding with the defendant put the speed of the car at 45 miles an hour. Nothing was said by either of these witnesses, nor were they asked, as to whether or not the horn was sounded, but of course, if it was material, the onus was on the defendant in this as in other respects to satisfy the jury that he was not at fault. One would think that it would be placing a heavy burden on the defendant driver to find that he should have anticipated that someone might suddenly come from behind the bus into the path of his car and accordingly should have reduced his speed to a point where he could stop or avoid that possibility. As to failure to sound the horn, the evidence was to the effect that he had not seen the boy before he appeared from behind the bus.

In *Seiden v. Pinkerton* (1926), 31 O.W.N. 325, the trial judge found that the plaintiff boy in that case was standing at the rear of a wagon on the road and that the driver of the motor car which ran him down might well have anticipated that the boy would cross the road to deliver parcels and that in such circumstances the driver did not exercise reasonable care in failing to sound his horn. In appeal, Masten J.A., delivering the judgment of the Court, said in part, (p. 326):

"If the driver had been plainly able to observe the boy examining a parcel to find the address for its delivery, the inference which the trial Judge drew might perhaps be a fair one; but the boy seized a parcel and darted out into the roadway when the car was no more than ten or twelve feet away, and ran in front of or against the fender of the car. . . .

"The inference that it was reasonably necessary for the driver to sound his horn was not to be drawn. All that the driver saw was a boy standing still behind a wagon. While

the boy was standing still there was no necessity for sounding the horn. In the case of so sudden a movement by the boy, the sounding of the horn was not reasonably necessary—certainly it would have been valueless.”

That case is only useful here to lend support to the view that it was not material in the circumstances that no special reference was made in the charge to the failure of the defendant to sound his horn and no direction in law given to the jury. The jury were invited to analyse all the evidence and were warned that because reference had been made to parts of it and not to all of it they must not assume that the parts to which reference had not been made were not important. The jury might, if they considered it important, have made some finding on speed or sounding of the horn. I do not think it was material that they were not specifically invited to consider the facts relating to this submission.

Complaint is made that the jury were not sufficiently charged on the question of onus. In addition to the instructions I have previously mentioned, the jury were charged as follows:

“Then in this case it is for the defendants to satisfy you that the conduct of the driver of the motor car was such that of him it could be said that at the time and place in question he acted as a reasonably prudent man.” This is clear and unequivocal. The learned judge might have proceeded to elaborate on the question, but his instructions were clear and put the burden of proof squarely on the defendants.

The broad basis of an application for a new trial is that there has been a miscarriage of justice. It is clear that if the Court is not satisfied that the real question to be determined was so left to the jury that their verdict was given upon the determination of that question, it may set aside the verdict: *Jones v. Spencer* (1897), 77 L.T. 536. In commenting on the evidence it is apparent that the trial judge indicates an inclination to accept the evidence of the defendants and it might be inferred that he would have thought it sufficient to discharge the burden resting on the defendants. He was, however, entitled to express his opinion so long as he did not lead the jury to think that he was giving them a direction which it would be their duty to follow: *The Montreal Tramways Company v. Séguin* (1915), 52 S.C.R. 644 at 655, 28 D.L.R. 494.

It was not obligatory for the trial judge to put the plaintiff's case in the most favourable way possible or to present all the difficulties that the plaintiff might suggest in the way of the defendant clearing himself of blame.

The complaints respecting misdirection on matters of fact do not, in the circumstances here present, warrant an order for a new trial.

In *Ryan v. The Oceanic Steam Navigation Company, Limited*, [1914] 3 K.B. 731, at 758, Kennedy L.J. says:

"The misdirections which the defendants allege relate to matters of fact. Their case is that the learned judge upon certain points set forth in their notice of appeal stated a wrong view of the effect of some of the evidence adduced at the trial, or by the expression of his opinion suggested to the jury wrong inferences."

After stating that he would assume this submission to be correct, the learned Lord Justice continued:

"I am not, on that account, justified in setting aside the verdict on the ground of misdirection in a case in which the judge has made it quite clear to the jurymen that they, and not he, are the judges on all questions of fact, and that, whatever opinion he may express as to this or that piece of evidence, the verdict must express their independent opinion."

The charge should be read as a whole and its general meaning and effect should be judged when so taken: *Jones v. Canadian Pacific Railway Company* (1913), 110 L.T. 83 (P.C.).

On a consideration of the whole charge in the light of the evidence, the substantial question to be determined was, I think, left to the jury to decide and there was no material misdirection which would warrant an order for a new trial. I feel somewhat fortified in this conclusion by the answers made by the jury to question no. 2 in finding affirmatively as they did that the deceased boy was negligent in failing to observe the traffic approaching from the west and in not waiting for the bus to continue west so that he could get a clear vision of the traffic approaching. It is evident that they did accept substantially the evidence for the defence as to how the accident occurred.

The appeal should be dismissed, with costs if demanded.

KELLOCK J.A.:—This action was brought by the appellant, the father of the late Chester Bronson, under the provisions of

The Fatal Accidents Act, to recover damages arising from the death of the son on 10th December 1941, alleged to have occurred as a result of being struck by a motor vehicle owned by the respondent George N. Evans and driven by the respondent William Evans, owing to the negligence of the driver. As the deceased was a pedestrian the appellant invoked the provisions of s. 48(1) of The Highway Traffic Act, R.S.O. 1937, c. 288. The question, "Have the defendants satisfied you that there was no negligence on their part or on the part of either of them which caused or contributed to cause the collision?" was answered in the affirmative by the jury. The second question, "Was there any negligence on the part of the deceased boy which caused or contributed to cause the collision?" was answered in the affirmative, the particulars of negligence being specified as, "Failing to observe traffic approaching from the west. Did not wait for bus to continue west so that he could get a clear vision of the traffic which might be approaching from the west."

The accident took place shortly after 7 o'clock in the evening of the day in question on Provincial Highway no. 2, east of Pickering. The deceased, a boy of thirteen years of age, was returning to his home at Pickering from Whitby where he worked. He was a passenger on a motor bus, which was travelling west and stopped on the north side of the highway to permit him to alight. The respondent's car was travelling east. The appeal is grounded upon objections to the charge of the learned trial judge.

The respondent William Evans was not present at the trial, but his evidence at the inquest held into the death of the deceased was read, by arrangement, on behalf of the defendants at the trial. He stated that at the moment of impact he was travelling at 45 miles an hour; the night was very black; there was a "normal amount of traffic for that highway at the time"; he was on the south side of the road in the centre of the south lane; at the time he first saw the bus it was standing still about 75 yards away, and he then lowered his lights; just as he got opposite the bus, which was just pulling away, he saw a dark object just flashing out from behind the bus when he was within 15 or 18 feet of it; the impact occurred and he pulled off the road as it was a very busy road and he did not want any one else to collide with the rear of his car; when his car stopped it was about 2 feet on the pavement; he had not put his brakes on prior to the

impact as that was impossible; he stopped his car within 50 feet of the place where the body of the boy was lying on the north shoulder of the road; his car did not swerve at all at the time of the impact; he did not bring his car to a stop on the highway at any time; when he brought it to a stop it was about two feet on the road; some soldiers moved his car back west about a car length after the accident; he had anti-freeze in his radiator, which all drained out as the result of damage to the car in the accident; and that he had not blown his horn.

Osmond, a passenger in the Evans car, said in chief that having gone through the village of Pickering, the car was travelling in the centre of the south half of the road at a speed of 40 to 45 miles an hour; the headlights were lowered when the car was some four car lengths from the bus, which at that time was just pulling on to the shoulder of the road for the purpose of stopping; he saw the bus stop and at that time the Evans car was about a car length west of it; when they came to the end of the bus there seemed to be a break in the left headlight beam of the Evans car and immediately afterwards there was the crash; at that time the Evans car had not changed its position in the south half of the road; immediately after the impact the hood flew up in front of the windshield, preventing Osmond from seeing anything further; Evans immediately braked the car and brought it to an immediate stop about four car lengths from where the bus had been standing and still in the centre of the south half of the road; it was subsequently moved two car lengths backwards to the west and on to the shoulder of the road; he saw glass lying on the south half of the road about two car lengths west of the boy, but saw nothing else on the road. In cross-examination he stated that he was not sure whether the bus was pulling to a stop, was stopped, or was just pulling away when he first paid any attention to it. He said there was no slackening of speed of the Evans car before the impact and that while he knew the anti-freeze was leaking out of the radiator of the car after the accident, he did not see any of it on the highway.

The bus driver, one Hill, was also called on behalf of the respondents. He stated that after leaving Whitby he stopped just west of the Pickering Beach road at a place 75 to 100 feet east of a driveway known as the Carveth drive, for the purpose of letting off the deceased; when stopped, the bus was 4 feet off

on the north shoulder of the road and 4 feet on the pavement; the boy got off and he started up the bus; at that time he had observed a car approaching from the west on the south half of the road; as the bus started to pull away this car was 50 to 100 feet to the west and it had passed the bus when the bus had moved one bus length.

In cross-examination he stated that the place where he stopped was just east of the Pickering Beach road, but that it was not a usual stopping place and that he had no reason to notice particularly the exact place where he had stopped. He admitted that at the inquest he had stated that the car at that time was not 50 to 100 feet, but about a block, from him.

The plaintiff called a number of witnesses who were at the scene of the accident shortly after it happened, and who deposed to a number of circumstances then existing. In the first place they found skid marks some 43 feet in length extending westerly from a point approximately 10 feet east of the Carveth drive and running south-west and north-east from the south half over on to the north half of the pavement; secondly, broken glass on the north half of the pavement extending some 25 feet east of the easterly end of the skid marks; thirdly, wet spots of water or anti-freeze and blood commencing from the east end of the skid marks and running approximately 150 feet on the north part of the highway to the point where the deceased's body was found, and then marks of water or anti-freeze from that point some 80 feet south-easterly across the highway to the south shoulder where the respondents' car was found; fourthly, that a glove belonging to the deceased, a rubber heel from one of his shoes and a bicycle clip were found either in the north ditch or on the north shoulder near where the glass was found and that pieces of metal grille which fitted the front of the respondents' car were also found some 70 feet east of the Carveth drive on the north part of the pavement and the north shoulder.

The witnesses for the appellant and the respondents all agree that the glass in the left headlight of the respondents' car was broken; that the radiator grille was broken and that the body of the deceased was found on the north shoulder of the highway.

The respondents called two provincial police officers, who arrived at the scene of the accident after it had occurred, and also the coroner, who had made an investigation the same evening. The first police officer, who arrived shortly after 7 p.m.,

stated that he found a number of skid marks on the pavement, but none that he was able to associate with the respondents' car, and that he found the boy's head in a pool of blood on the north shoulder, but no blood anywhere else; that the majority of the broken glass was on the south half of the pavement, but that he did not find any anti-freeze or water marks west of the body; that he did find a pair of skid marks proceeding east from the neighbourhood of the Carveth driveway for some 20 or 30 feet roughly parallel with the road, the most northerly of which were on the north part of the pavement; that there was considerable traffic in both directions and that generally speaking the traffic at that point is heavy; that no marks of water or anti-freeze or blood on the highway were pointed out to him by the plaintiff's witnesses at the time, and that at the time of the accident he did not know that the radiator of the Evans car was broken.

The second police officer arrived at approximately 8 p.m., at which time the first officer was still there. He stated that he examined the road between the Carveth drive and the Evans car; skid marks were pointed out to him by one of the plaintiff's witnesses in the vicinity of the Carveth drive running east and west; there were other skid marks and he was unable to connect the skid marks which had been pointed out to him with the Evans car; there was no blood at the east end of the skid marks, nor any water or anti-freeze or glass there, and no blood, water or anti-freeze marks existed between that point and the body; there was glass at the rear of the Evans car on the pavement in the vicinity of the centre line of the road about two car lengths west of the body; he did not see any pieces of metal on the highway; there was water or anti-freeze under the Evans car, but nowhere else on the highway. During the cross-examination of this witness it was established that the Pickering Beach road is over 300 feet east of the Carveth drive, but just how much more is not clear. The coroner arrived at the scene of the accident about 7 o'clock. He saw no signs of the accident between the Carveth drive and the body and no marks of anything on the highway.

I have not attempted to reproduce all that was deposed to, but only sufficient to indicate the main lines of cleavage between the witnesses for the appellant and those for the respondents. I have, however, pretty well given the evidence of the witnesses

Evans, Osmond and Hill, as it is necessary to do so in considering the complaints with regard to the charge.

In his charge the learned trial judge pointed out that, by reason of the fact that the deceased was a pedestrian at the time, the burden of proving to the satisfaction of the jury that his death was not the result of negligence on the part of Evans rested on the shoulders of the latter, and he said that that was something of which they could not afford to lose sight. He then explained the meaning of negligence and said that the defendants had to satisfy them that the driver of the motor car at the time and place in question conducted himself as a reasonable man and that if they were so satisfied, they would answer the first question in the affirmative. After pointing out to the jury that the facts were for them and that they must reach their conclusion on the evidence, he said that there were two propositions put to them as to the manner in which the collision had occurred, *viz.*, that for the plaintiff it was contended that having regard to the articles which were found on the north half of the road and to the skid marks and the anti-freeze and blood marks, these things led to the inescapable conclusion that the collision had occurred on the north side of the road; that the proposition on behalf of the respondents was that the collision did not occur on the north side of the road but on the south side and that the actual impact occurred at the moment when the boy suddenly emerged from behind the bus into the path of the motor car, which was then on its own side of the road.

The learned judge then said that the evidence fell under two headings; first, the evidence of eye-witnesses, and secondly, the evidence of those who were not present but who made investigations later, and upon whose evidence an argument had been put forward that the accident occurred on the north side of the road. After telling the jury that appellant's counsel had said to them that if they answered question No. 1 in the negative, they were not thereby saying that the appellant's witnesses, in saying what they said they saw, were untruthful, the learned judge proceeded as follows:—[see passage commencing "Mr. Levinter said", *supra*, p. 256].

The learned judge then proceeded to review the evidence from the standpoint: "What else is there in the evidence?" The jury were asked to take the evidence of the eye-witnesses, that is Evans and Osmond, and to see whether or not it could be made

to "fit in" with the evidence of the appellant's witnesses who spoke as to the articles found and the marks on the pavement. The learned judge said:

"If it can be made to dovetail with it, then perhaps, unless there is some other good reason, you will have no hesitancy in coming to the conclusion that those who were there and saw what happened spoke the truth at this trial."

Later on he said: "I come back to the point from which I started, that the onus rests on the defendants, and if you believe Evans and Osmond, then perhaps you will say they have satisfied the onus."

The learned judge completed a review of the evidence as follows:—[see passage commencing "Now, because I have made reference", *supra*, p. 264].

While the learned judge left the jury free in this way to consider the facts, the real question to my mind is whether or not he properly directed the jury in law with regard to the discharge of their duty, or whether the inquiry which they were to make upon the evidence was the proper inquiry having regard to the statute upon which the appellant relied. In a consideration of this question the charge is to be considered as a whole.

For the appellant it is argued that the task to be performed by the jury was not to determine as to whether or not the accident occurred on the north or south side of the road and to arrive at their decision by choosing between two explanations of the accident diametrically opposed to each other, by accepting or rejecting one or the other as a whole; that the jury were not told that they might accept or reject what any witness said or accept part of what a witness said and reject the rest; that whether or not the accident had, in the jury's view, occurred on the north or south side, nevertheless even if the jury could not say where the impact occurred, north or south of the centre line, or east or west of the Carveth drive, they ought to have been directed that if they were not satisfied that the accident had not occurred by reason of the negligence of the respondent driver, the appellant was entitled to their verdict even although they could not all (or any ten of them) agree on what that negligence was; that the jury were not given any direction as to any duty resting upon the respondent driver in approaching at that place and at that time a bus which, for all he knew, was discharging passengers who might desire to cross the road from north to

south, in the light of the evidence of the respondent driver that he was travelling at 45 miles per hour and that he did not slacken speed or blow his horn as he approached and passed the bus.

This being a case to which subs. 1 of s. 48 of The Highway Traffic Act applies, the judgment of the Privy Council in *Winnipeg Electric Company v. Geel*, [1932] A.C. 690 at 695, [1932] 4 D.L.R. 51, 40 C.R.C. 1, [1932] 3 W.W.R. 49, is applicable. Lord Wright there discussed the effect of the corresponding section of the Manitoba statute in these words:

"But the onus which the section places on the defendant is not in law a shifting or transitory onus; it cannot be displaced merely by the defendant giving some evidence that he was not negligent, if that evidence, however credible, is not sufficient reasonably to satisfy the jury that he was not negligent; the burden remains on the defendant until the very end of the case, when the question must be determined whether or not the defendant has sufficiently shown that he did not in fact cause the accident by his negligence. If, on the whole of the evidence, the defendant establishes this to the satisfaction of the jury, he will be entitled to judgment; if, however, the issue is left in doubt or the evidence is balanced and even, the defendant will be held liable in virtue of the statutory onus, whereas in that event but for the statute the plaintiff would fail, because but for the statute the onus would be on him. A fortiori the defendant will be held liable if the evidence actually establishes his negligence."

As pointed out by Middleton J.A. in *Newell et al. v. Acme Farmers Dairy Ltd.*, [1939] O.R. 36 at 43, [1939] 1 D.L.R. 51:

"The importance of [giving full effect to the statutory provision] is that the jury may find itself quite satisfied that the defendant has failed to meet the statutory onus cast upon him. But each of the jurors may have a different ground for so thinking, and it may be impossible for a jury who rightly believe that the accident was caused by negligence to specify exactly in what the negligence consisted."

In the *Geel* case in the Supreme Court of Canada, [1931] S.C.R. 443, [1931] 3 D.L.R. 737, 38 C.R.C. 142, the present Chief Justice of Canada, at page 446 (S.C.R.), said:

"If, at the conclusion of the evidence, it is too meagre or too evenly balanced to enable the tribunal to determine this issue, as a question of fact, then, by force of the statute, the plaintiff is entitled to succeed."

The duty of a trial judge in charging a jury is stated by Nesbitt J. in *Spencer v. The Alaska Packers Association* (1904), 35 S.C.R. 362 at 371, as follows:

“ . . . I think he is bound to direct the jury as to the law and to direct their attention how that law is to be applied to the facts before them according as they find them.”

In *Prudential Assurance Company v. Edmonds* (1877), 2 App. Cas. 487, Lord Blackburn, at 507, puts the matter in this way:

“So far as a statement of the law is necessary to give a proper guide to the jury upon the case, the Judge should state it; and, although it is generally said, and said truly, that non-direction is not a subject of a bill of exceptions, yet when the facts are such that in order to guide the jury properly there should be a direction of law given, the not giving that direction of law would be a subject for a bill of exceptions and would be a ground for a *venire do novo*. When once it is established that a direction was not proper, either wrong in giving a wrong guide, or imperfect in not giving the right guide to the jury, when the facts were such as to make it the duty of the judge to give a guide, we cannot inquire whether or no the verdict is right or wrong as having been against the weight of evidence or not, but there having been an improper direction there must be a *venire do novo*.”

In my opinion the objections made to the charge should be sustained. My view is that the law as laid down in the *Geel* case was not sufficiently explained to the jury as it applied to the facts as they might find them. In centering the attention of the jury upon where the accident took place, to be determined by an inquiry as to which set of witnesses they might believe was telling the truth, without letting the jury know that they might accept or reject the evidence of any witness in whole or in part, and without directing them that if they were not satisfied that the accident had not occurred by reason of negligence on the part of Evans, even if it was impossible for them to specify the negligence, they should find for the appellant by reason of the statute, the judge, I think, deprived the appellant of a substantial right to which he was entitled: *Spencer v. The Alaska Packers Association*, *supra*, at p. 367, citing Lord Watson in *Bray v. Ford*, [1896] A.C. 44 at 49. The evidence of Evans, Osmond and Hill or even that of Evans and Osmond could hardly be accepted as a whole and resolved into one consistent account. That evidence

contained a number of important discrepancies which may be seen from it as set out above. To borrow the language of Hodgins J.A. in *Hill v. Wells* (1920), 19 O.W.N. 266 at 267:

"The entire discussion by the trial Judge of the negligence of the parties and the bearing of their acts upon the question of . . . negligence was based wholly upon the truth of one or other of the versions of how the accident happened,, and not upon the assumption that neither might be wholly correct. It was, no doubt, intended differently; but the basis was as stated. . . . The jury were not in a position to deal with the real issues before them. . . ."

The present is not a case where there was merely a choice between two clear accounts, either of which was capable of acceptance or rejection, free from all self-contained contradiction and all question as to the accuracy of observation of those deposing to those accounts. Even had that been the case, I would none the less be of opinion that the charge left out of account the important consideration that if the jury were unable to specify the negligence but were not satisfied that the accident did not occur by reason of negligence on the part of the driver, the appellant was entitled to their verdict. It is with great respect for the careful and experienced trial judge that I venture to differ from him, but my view is as above stated.

I further think that the circumstances called for a direction with respect to the duty of the respondent driver and the deceased boy, respectively. What is said in *Hadley v. Carolis* (1922), 22 O.W.N. 72 at 73 with relation to other circumstances is, I think, applicable here.

I would therefore allow the appeal and direct a new trial, the appellant to have the costs of the appeal; the costs of the former trial to be to the appellant in the cause.

Appeal allowed and new trial ordered, GILLANDERS J.A., *dissenting*.

Solicitors for the plaintiff, appellant: Luxenberg & Levinter, Toronto.

Solicitor for the defendants, respondents: A. W. S. Greer, Oshawa.

[HOPE J.]

Re Wood.

Wills—Construction—Annuity “clear and free” of all Taxes—Whether Chargeable to Corpus—Annuitant in Receipt of Separate Income—Computation of Tax Payable by Estate—Vesting of Share in Residue.

A testator provided, by para. 5 of his will, for the payment of an annuity to his widow. The annuity was to be “free and clear of all taxes” imposed by the Dominion, a Province or a municipality; the taxes were to be paid out of “my Estate”, and if the widow paid any taxes in respect of this income they were to be repaid to her out of “my Estate”. The same paragraph provided for four other annuities, each to be paid to the annuitant “during the term of his life”. By para. 7, the testator directed that “so much of the income of my Estate as shall not be required for the purpose aforesaid shall sink into and form part of the Residuary Trust Estate.” Para. 11 directed the trustees, on the death of the widow, to pay a legacy to each of two named institutions, “and to pay the balance” to the testator’s brother R. Para. 12 authorized the trustees, if R. “shall become entitled to a share in my Estate under the provisions hereinbefore contained”, to make advances to him during the widow’s lifetime, “retaining however an ample portion of my Estate for my Wife’s Annuity”. R. survived the testator, but predeceased the widow. On a motion for construction and advice,

Held, (1) The annuities were chargeable against the corpus as well as the income of the estate, notwithstanding the direction as to surplus income. *Carmichael et al. v. Gee et al.* (1880), 5 App. Cas. 588; *In re Mason*; *Mason v. Robinson* (1878), 8 Ch. D. 411, applied. (2) The widow’s annuity, being given to her in lieu of dower, was payable in priority to the other annuities mentioned in para. 5, and did not abate with them. *Re Rispin* (1914), 35 O.L.R. 385 at 394; *Re Mackay* (1915), 8 O.W.N. 263 at 265, applied. (3) The taxes payable out of the estate included income taxes assessed against the widow in respect of the annuity on the same basis as if the taxes were added to, and formed part of, the annuity. The widow being in receipt of separate income, the executors should pay such proportion of all income taxes payable by her as the amount of the annuity, with the tax paid in respect thereof, bore to her total income from all sources. *In re Kemp*, [1940] S.C.R. 353, applied. The executors should not, however, pay the “compulsory savings” portion of the tax, since this was refundable to the widow or her estate. (4) The other annuities provided for by para. 5 of the will were payable to the annuitants after the widow’s death, if they survived her; the direction in para. 11 for distribution on the widow’s death could not override the express words of para. 5. *Re Bucovetsky*, [1942] O.W.N. 618 at 621; *Re McCaul*, [1943] O.W.N. 35 at 37, applied. (5) R.’s share in the residue vested in him upon the death of the testator. *Browne v. Moody et al.*, [1936] A.C. 635, considered.

A MOTION by the executors and trustees of T. H. Wood, deceased, for the interpretation or construction of his will, and for the opinion, advice and direction of the Court. The relevant provisions of the will, and the questions asked, are set out in the judgment.

3rd March 1943. The motion was heard by HOPE J. in Weekly Court at Toronto.

G. B. Strathy, K.C., for the executors and trustees, applicants.

G. M. Huycke, K.C., for the widow.

J. R. Cartwright, K.C., for L. R. Dowker and E. A. Kortright.

W. Proudfoot, K.C., for W. H. Baldwin and W. H. Agnew.

D. Guthrie, for Trinity College (Toronto).

J. G. Middleton, for the Hospital for Sick Children.

R. C. H. Cassels, K.C., for the estate of Robert Wood.

25th March 1943. HOPE J.:—This is a motion to construe certain provisions contained in the will of Thomas Henderson Wood, late of the City of Toronto, deceased.

It is of assistance to appreciate the circumstances of the deceased and the estate in approaching a proper interpretation of the terms used in his last testament.

The deceased, a man of considerable means, leaving an estate of over two million dollars, died leaving his widow but no issue. The estate, after the payment of generous and numerous specific legacies, which were directed to be paid free of succession duties, and after paying all succession duties, is reported to amount at the present time to approximately one and one-quarter million dollars corpus.

In his lifetime the testator had been a generous benefactor of Trinity College, Toronto, and the Hospital for Sick Children, Toronto, both of which institutions are named not only as specific legatees but also as residuary legatees to the extent of a further \$100,000 each.

From a reading of the entire will, it appears that after a specific bequest of furniture, jewellery, etc., to his wife, and after providing for some sixteen more or less generous legacies to be paid free of all succession duties to various friends, relatives and institutions, the testator in paras. 4 and 5 of his will, especially in clause (a) of para. 5, provided for the chief object of his solicitude and bounty, *viz.*, his wife. The paramount position which she occupied in his testamentary scheme is abundantly evidenced throughout the will.

Para. 4 gave, devised and bequeathed:

“all other my real and personal estate unto my Trustees hereinafter named UPON TRUST that my Trustees shall sell call in and convert into money the same and shall with and out of the moneys produced thereby and out of my ready money pay my funeral expenses and debts testamentary expenses succession

duties and the above Legacies and invest the residue of the said moneys, with power to my Trustees from time to time to vary such investments."

The other paragraphs of the will which are pertinent to the motion now before the Court, are as follows:

"5. AND shall stand possessed of such Residuary Trust Moneys and the Investments for the time being representing the same IN TRUST—

"(a) TO PAY to my said Wife HELEN during her life if she shall so long remain my Widow an Annuity of Thirty Thousand Dollars by equal quarterly payments dated from my death. And if she shall marry again IN TRUST to pay to my said Wife during the rest of her life an Annuity of Fifteen Thousand Dollars by equal quarterly payments subject to the following conditions:

"I DECLARE AND DIRECT that the Annuity given to my said Wife by this my Will is intended to be and shall be paid to her free and clear of all legacy and succession duty and free and clear of all taxes whether imposed by the Dominion of Canada or any Province or Municipality or otherwise howsoever during the lifetime of my Wife—and the same shall be paid each year out of my Estate. Should my Wife pay any such taxes in respect of her income either before or after receipt of such income the taxes so paid by her from time to time shall be repaid to her out of my Estate.

"The provisions made in this my Will for the benefit of my Wife are so made and are to be accepted by her in lieu and satisfaction of her Dower in my real estate and of all claims under the Ante-Nuptial Contract of Marriage made between myself and my Wife dated the Seventh September, 1905, and of all other claims and demands which my Wife may have against me at the time of my death or against my Estate.

"(b) TO PAY to my friend ERNEST A. KORTRIGHT of Rothesay, N.B. an Annuity of Five Hundred Dollars in equal quarterly payments dated from my death, during the term of his life.

"(c) TO PAY to my friend LESLIE R. DOWKER of Beau-repaire, P.Q., an Annuity of Three Thousand Dollars in equal quarterly payments dated from my death, during the term of his life.

“(d) TO PAY to my friend WILLIAM HARLEY BALDWIN of Toronto an Annuity of Six Hundred Dollars a year in equal quarterly payments dated from my death, during the term of his life.

“(e) TO PAY to my friend WILLIAM H. AGNEW of the City of Montreal, P.Q., an Annuity of Nine Hundred Dollars a year in equal quarterly payments dated from my death, during the term of his life.”

Para. 6 contains a brief provision against the alienation by any of the above-mentioned annuitants of their annuities or any part of them by way of anticipation, mortgage, transfer or lien, and also provides that the annuities shall be free from succession duties.

Para. 7 reads as follows:

“7. AND I DECLARE that so much of the income of my Estate as shall not be required for the purpose aforesaid shall sink into and form part of the Residuary Trust Estate.”

Para. 8 contains certain provisions as to the testator's wife having the use of any house or residence owned by the testator and in which he and his wife might reside at the time of his death, or for the sale of such residence, with power to the executors to purchase any suitable residence, the residence or substituted residence to fall into the residue of the estate.

Paras. 9 and 10 contain some further provisions as to disposition of the residence in the event of the testator's wife not desiring to reside therein.

Paras. 11 and 12 read as follows:

“11. UPON the decease of my Wife my said Trustees shall stand possessed of the said Residuary Trust Fund IN TRUST to pay to the HOSPITAL FOR SICK CHILDREN (Toronto) a further Legacy of One Hundred Thousand Dollars (\$100,000.00), and also to pay to TRINITY COLLEGE (Toronto) a further Legacy of One Hundred Thousand Dollars (\$100,000.00), and to pay the balance to my brother ROBERT WOOD.

“12. If my brother ROBERT WOOD shall become entitled to a share in my Estate under the provisions hereinbefore contained I Authorize and Empower my Trustees at any time or times to advance to my said brother ROBERT WOOD during the lifetime of my Wife any part or parts of the expectant share of my Estate which my said Brother would be entitled to re-

ceive on the final disposition of my Estate, and my Trustees may make such advances as my said Trustees other than my Brother may in their uncontrolled discretion think fit, retaining however an ample portion of my Estate for my Wife's Annuity and all other claims against my Estate—the amount to be retained to be in the absolute and uncontrolled discretion of my Trustees other than my Brother.”

The will was executed on 22nd November 1937 by the testator, who died on 30th April 1938.

After careful and repeated reading of the will, I have approached its construction fully conscious of the well-recognized duty of the Court which is so clearly expressed by Farwell J. in *In re Hodgson; Nowell v. Flannery*, [1936] Ch. 203 at 206:

“... the duty of the Court in the first place is to read the will itself. The Court is bound in the first instance to read it, giving the words used their primary and proper meaning. The Court is then entitled to look at the surrounding circumstances. If the surrounding circumstances are such that the words of the will, if construed in accordance with their primary meaning, are not apt to apply to any of the circumstances, then the Court is entitled, having regard to the surrounding circumstances, to see whether the language used is capable of some meaning other than its ordinary meaning, not for the purpose of giving effect to what the Court may think was the intention of the testator, but for the purpose of giving effect to what the intention of the testator is shown to be from the language used having regard to the surrounding circumstances. In other words, the Court is not entitled to disregard the language which the testator has used in order to give effect to what the Court may think to have been the intention, but the Court is entitled to say that the words which the testator has used were not intended to have their primary meaning if the surrounding circumstances are such as to lead inevitably to that conclusion.”

I have also given careful consideration to the different cases and authorities relied upon by the various counsel in their arguments. How far previous decisions are a benefit in interpretation motions, is best expressed by Lord Brougham in *Baker v. Baker* (1858), 6 H.L. Cas. 616, 10 E.R. 1436:

“It has been very justly observed, in regard to cases like this, where the sole question that arises is upon the construction of a will, and where the object is to ascertain the meaning of

the words used by the testator, that nothing, generally speaking, can be more unfruitful than a reference to other cases where, instead of the question arising upon a principle of law, or a rule of law, the whole question arose upon the meaning of the words employed in the will; and the least difference between the case at the bar and the case cited, will make all the difference in the world, and render the application of the case cited utterly useless."

No one case can be said to govern another. There are, however, certain principles of construction, applicable to such cases, that seem to be well established. Therefore, recognizing such principles so far as applicable, and as I understand them, it is my duty to ascertain the testator's intention and to carry that intention into effect.

The questions submitted for answer are as follows:

"Question 1—Are the annuities payable to the Widow of the Testator under paragraph 5(a) and to certain other persons under paragraph 5(b) (c) (d) and (e) of the said Will a charge against the capital assets of the estate, or are they only a charge against the income of the estate?

"Question 2—Is the said annuity payable to the Widow payable in priority to the said other annuities provided in the said paragraph 5, or do all the said annuities rank *pari passu*, and abate proportionately in the event that abatement is necessary?

"Question 3—If the said annuities are a charge against the income only, may a surplus of income accumulated in a previous year or previous years be applied in a subsequent year or subsequent years towards payment of the said annuities in the event of the income in such subsequent year or years being insufficient to pay the said annuities in full?

"Question 4—Is the said Widow entitled, under the provisions of the said paragraph 5, to have all income taxes assessed against her in respect of the said annuity paid by the Executors out of the estate on the same basis as though the said taxes were added to and formed part of the said annuity?

"Question 5—If the said Widow is entitled to have all income taxes chargeable against her in respect of the said annuity paid out of the estate, should the Executors pay such proportion of all income taxes payable by the said widow as the total amount of the annuity and income taxes paid in each year in respect

thereof bears to the total amount of the said Widow's income from all sources?

"Question 6—If the answer to the next previous question is in the negative, what proportion of all income taxes payable by the said Widow should be paid by the Executors of the Estate?

"Question 7—In view of the provisions of paragraph 11 of the said Will directing distribution of 'the said Residuary Trust Fund' upon the decease of the said Widow, are the annuities referred to in said paragraph 5(b) (c) (d) and (e) payable during the respective lives of the said annuitants therein referred to, or do such annuities cease to be payable on the death of the said Widow?

"Question 8—The Testator died on the 30th day of April, 1938. Robert Wood, brother of the testator and residuary beneficiary, under paragraph 11 of the said Will, died on the 5th day of March, 1940. Did the interest of the said Robert Wood in the said estate vest in him on the death of the Testator?"

Outside of the early specific legacies, it is apparent that the testator's primary idea in setting up a trust fund is to provide with certainty and liberality for his wife's maintenance. In this connection it should be noted that the testator died possessed of realty in which his wife would have been entitled to dower. Furthermore the testator and his wife had entered into an antenuptial contract of marriage prior to their marriage in 1905. This last named contract was filed, and provides, *inter alia*, for their continued enjoyment of their separate property, for the wife's release of all claims to dower, and for an annuity of one thousand dollars per annum to the wife from the date of his death and so long as she remains his widow.

In dealing with the first question, it should be noted that by paras. 4 and 5 the trustees stand possessed of "such Residuary Trust Moneys and the Investments for the time being representing the same", to pay the annuities enumerated in clauses (a), (b), (c), (d), and (e) of para. 5. There is no suggestion that such annuities should be paid only from the income arising from "such Residuary Trust Moneys". Thus it would appear that the whole of the said residuary trust moneys, that is both as to income and corpus, is liable for the payment of the annuities.

It was contended to the contrary, in part relying upon the terms of para. 7 of the will hereinbefore recited, which directs

that any surplus income from the estate shall sink into and form part of the residuary trust fund. I am convinced, however, after reviewing the general scheme of the will, that this last was but a careful provision made by the testator to guard against any question as to intestacy with respect to surplus income from what appeared at the time of the execution of his will to be a very considerable estate. Furthermore it must be borne in mind that while the income falls into the residuary trust, the whole of such residuary trust moneys are in the first instance charged with the payment of the annuities. The fact that directions are given as to the disposition of the surplus income, if any, after the payment of the annuities, affords an argument against a charge upon the corpus, but not by any means a conclusive argument to such effect: *vide In re Collier's Deed Trusts; Collier v. Collier*, [1939] Ch. 277, 106 L.J. Ch. 326. In this latter case, the case upon which Mr. Cassels relied, namely *Stelfox v. Sugden* (1859), Johns. 234, is discussed. In the light of this discussion and the general purport of the will at bar, I can see no application here to the principles followed in the latter case. There are numerous cases which have dealt with the matter as to whether or not an annuity was chargeable against corpus as well as income, the general principle as expressed in *Theobald on Wills*, 9th ed., p. 418, being that "if the annuity is given in general terms and there is then a gift of residue, the annuity is charged upon the *corpus*. *Wroughton v. Colquhoun* (1847), 1 DeG. & Sm. 357, 63 E.R. 1103; *Croly v. Weld* (1853), 3 DeG. M. & G., 993, 43 E.R. 389."

Therefore the answer to the first question must be that the annuities in question are all chargeable to the corpus as well as to the income.

In *Carmichael et al. v. Gee et al.* (1880), 5 App. Cas. 588, it was held in a rather comparable situation that the bequest was one of an annuity, and not so restricted as to be exclusively payable out of income, and that the deficiency was to be made good out of corpus. *Vide also In re Mason; Mason v. Robinson* (1878), 8 Ch. D. 411, where it was held that annuities were chargeable to corpus.

I feel fortified in this opinion by what appears to be the testator's own expressed wishes. Para. 11 provides for the distribution of the said residuary trust fund after the death of the testator's wife, firstly, with two specific legacies of \$100,000 each

to the Hospital and College aforesaid, and the residue of the trust fund to the brother of the testator. But in para. 12 are found the words: "If my brother Robert Wood shall become entitled to a share in my Estate under the provisions hereinbefore contained". Had the testator intended that only the income should be used for the satisfaction of the annuities, then it would appear obvious that there would undoubtedly have been a balance of the residuary trust fund for payment to the testator's brother Robert. The testator, however, implies that after all other provisions of his will and claims thereunder have been met, there is some doubt as to whether or not his brother Robert will become entitled to a share. The further terms of para. 12, "retaining, however, an ample portion of my Estate for my Wife's annuity and all other claims against my Estate", sustain such a belief as I have expressed in the patent intention of the testator.

The testator's intention that the corpus was to be available to satisfy, if necessary, the provisions made for the widow, appears to be further manifested in the terms of the second subparagraph of para. 5(a), *viz.*, "the same shall be paid . . . out of my Estate," and again "shall be repaid to her out of my Estate." Giving to the word "estate" its normal and primary meaning, there was clearly in the testator's contemplation the subjection of corpus as well as income of the estate to liability for the stipulated payments.

Reliance by Mr. Cassels on the use of the words "the said Residuary Trust Fund" in para. 11 in support of his contention that the corpus of "such Residuary Trust moneys", referred to in para. 5, must remain intact for the purposes of para. 11, must fail. As was said by Grant J. in *Re Keddy* (1926), 29 O.W.N. 480 at 481, "The word 'said' in the last paragraph was inapt and not intended to have any special reference."

With respect to Question 2, Middleton J., in *Re Rispin* (1914), 35 O.L.R. 385 at 394, 27 D.L.R. 574, states:

"The law by which a legacy to a widow in lieu of dower is entitled to priority is now too well settled to admit of question."

It may be argued that the widow had already relinquished any claim to dower by reason of her ante-nuptial contract, nevertheless I am of the opinion that the payment contemplated by such contract, being in substitution for dower, is clothed with the same benefits, so far as the widow is concerned, as the origi-

nal claim to dower, and as stated in *Re Mackay* (1915), 8 O.W.N. 263 at 265, again by Middleton J.: “. . . it is plain that the annuity to the wife, being in satisfaction of her dower, is entitled to priority.”

Question 2 is therefore answered accordingly.

In view of the disposition of Question 1, it is not necessary to deal with Question 3.

The answer to Question 4 is to be found in the second paragraph of clause (a) of para. 5 of the will. There can be no question but that income tax falls within the words “all taxes whether imposed by the Dominion of Canada or any Province or Municipality or otherwise howsoever”, from which taxes the annuity of the wife is expressed to be “free and clear.”

A testator may by proper words direct the income tax upon an annuity to be paid out of his estate: *Festing v. Taylor et al.* (1862), 3 B. & S. 217 at 234, 122 E.R. 83; *In re Bannerman's Estate; Bannerman v. Young* (1882), 21 Ch. D. 105. I fail to comprehend how a testator could use more apt words than “free and clear” here employed.

On the hearing of this motion, it was stated and admitted that in addition to the annuity derived from the estate, the widow is in receipt of income from her own separate estate. Following the recent decision in *In re Kemp*, [1940] S.C.R. 353, [1940] 2 D.L.R. 209, I am of the opinion that Question 4 is to be answered in the affirmative. Similarly, following *In re Kemp* the fifth question should be answered that the executors should pay such proportion of all income taxes payable by the said widow as the amount of the annuity and income tax paid in each year in respect thereof bears to the total amount of the widow's income from all sources. In this connection, Mr. Guthrie raised the point that there is linked with the present scheme of income tax by the Dominion, a compulsory savings plan. Compulsory savings being refundable, cannot be considered in the category of taxes contemplated by the will, and therefore I think compulsory savings which may be levied with respect to the widow are not payable in any part from the estate, but solely by the widow, to whom, or to whose estate, the compulsory savings are refundable by the Government at some date in the future.

In view of the disposition of Question 5, any answer to Question 6 becomes unnecessary.

The point raised in Question 7 arises by reason of what would appear to be a contradiction as between the terms of para. 5(b), (c), (d) and (e) respectively, which are identical as to the duration of the annuity namely, during the term of each annuitant's lifetime, and the direction in para. 11, namely, that upon the death of the testator's widow the trustees are to make distribution of the corpus or remainder of the corpus as in para. 11 directed.

It might be argued that the four annuities in question, to friends of the testator, terminate with the death of the wife. However, I am of the opinion that in view of the very clear and concise definition of the term of each annuity in its respective gift clause, the same cannot be cut down by the more indefinite provisions of para. 11. It can be readily conceded that the fund required to pay the four small annuities in question can be accurately computed at the death of the wife, thus enabling, at that point of time, the distribution directed by the testator in para. 11 to be effected, subject to the continued payment of such annuities. It can readily be appreciated that the more generous contribution made for the wife not only as to the quantum of the annuity itself but as to the payment of taxes with respect to the wife's income, is something which is far from determinable with exactitude, and therefore a proper reason is afforded for deferring the distribution of the residue of the trust fund until after the death of the wife.

As expressed by me in *Re Bucovetsky*, [1942] O.W.N. 618 at 621, [1943] 1 D.L.R. 208, and cited by Mackay J. in *Re McCaul*, [1943] O.W.N. 35 at 37: "Where the earlier gift is absolute . . . then any cutting down must be in clear and unequivocal terms with a resultant gift over." I cannot feel that there is a cutting down of the term by para. 11, and the provisions of para. 11 are quite consistent with the continuance of the annuities to the four friends of the testator, if living, after the death of the widow.

The final question is one in which only the residuary beneficiary of the ultimate residue is interested. Reliance in favour of vesting was based on the decision of the Privy Council in *Browne v. Moody et al.*, [1936] A.C. 635, [1936] 2 All E.R. 1695, [1936] O.R. 422, [1936] 4 D.L.R. 1, [1936] 3 W.W.R. 59. That decision was upon facts somewhat at variance with those at bar in that the direction in that will was only to pay the income to

the life annuitant without encroachment on corpus, and to divide the capital among certain other named and ascertained persons on his death.

Despite the fact that in this present case the corpus may be subject to the payment of the annuities and other charges, I am of the opinion that, subject to the payment of all such claims and to the payment of the Hospital and College residuary legacies, there was a vesting *a morte testatoris* in Robert Wood.

Such vesting is apparently clearly evidenced by the testator's own language in para. 12, providing for advances to the brother, should he be entitled to any residuary share, after due and ample provision had been made for the annuity to the testator's wife and all other claims against the estate. Question 8 is therefore answered accordingly.

Costs of all parties, including solicitor and client costs to the solicitor for the executors, to be paid out of the estate.

Order accordingly.

Solicitors for the executors and trustees: Strathy, Cowan & Setterington, Toronto.

[COURT OF APPEAL.]

Thomson Groceries Limited v. Scott.

Specific Performance—Definiteness of Contract—Agreement to Give Mortgage—Term of Mortgage Not Specified—Enforceability of Agreement.

A lease contained a clause giving to the lessee an option to purchase the demised premises "for the sum of \$7375.00 during the life of the lease—Terms \$4000.00 cash, balance 1st Mortgage Interest at 5% per annum." *Held*, this clause, upon the exercise of the option by the lessee, constituted a valid and enforceable contract for sale of the land, notwithstanding that there was no provision as to the time or terms of repayment of principal under the mortgage. *McDonald v. Murray et al.* (1883), 2 O.R. 573; 11 O.A.R. 101, applied; *Reynolds v. Foster* (1912), 3 O.W.N. 983, 21 O.W.R. 838, 3 D.L.R. 506; 4 O.W.N. 694, 23 O.W.R. 933, 9 D.L.R. 836, distinguished. A covenant to repay would be implied under s. 6 of The Mortgages Act, R.S.O. 1937, c. 155, and the mortgage would therefore be one payable on demand. *Sutton v. Sutton* (1882), 22 Ch. D. 511; *Higgins v. McLachlan* (1881), Russ. Eq. Rep. (N.S.) 441, applied. The mortgage should be in the form provided in The Short Forms of Mortgages Act, R.S.O. 1937, c. 155.

AN appeal by the plaintiff from the judgment of Urquhart J., [1943] O.W.N. 88, [1943] 1 D.L.R. 698, dismissing its action for specific performance of an option given by the defendant to the plaintiff to purchase certain lands. The facts are fully stated in the judgment of KELLOCK J.A.

8th March 1943. The appeal was heard by RIDDELL, FISHER and KELLOCK JJ.A.

J. Shirley Denison, K.C., for the plaintiff, appellant: The point involved in this appeal is an important one, namely, whether an agreement to give a charge or mortgage, not specifying a date for payment, is a valid and enforceable agreement. I submit that it was sufficiently definite to enable the Court to decree specific performance. The case is governed by *McDonald v. Murray et al.* (1883), 2 O.R. 573; 11 O.A.R. 101. Both *Reynolds v. Foster* (1912), 3 O.W.N. 983, 21 O.W.R. 838, 3 D.L.R. 506, affirmed 4 O.W.N. 694, 23 O.W.R. 933, 9 D.L.R. 836, and *Jackson v. Macaulay Nicolls Maitland and Company Limited and Willett*, 57 B.C.R. 492, [1942] 2 D.L.R. 609, [1942] 2 W.W.R. 33, are distinguishable.

In the present case there is no evidence of any agreement other than that in the writing, and where parties have made no other agreement as to when the mortgage should be payable, then the mortgage is practically a demand mortgage. The decision of the Court of Appeal in *McDonald v. Murray et al.*, *supra*, was predicated upon the existence of a contract, and it was

nowhere suggested that there was no contract because no time for payment of the mortgage was named. The decision of the judges in that case rested upon the assumption that there was an existing contract. [KELLOCK J.A.: What do you say is the effect of the *McDonald* case as to the terms of the mortgage?] It is a valid contract, sufficiently definite. [RIDDELL J.A.: After the special clause was introduced into the lease, the landlord respondent accepted rent, and acknowledged the agreement. Why shouldn't a mortgage be made without specifying the time of payment?] It is necessary for this Court to decide if a man can be bound by a covenant to give a mortgage if he does not specify the time of payment. It is submitted that by substituting any other agreement for that which the parties mistakenly thought they were to carry out, the Court would be making, in effect, a new and different contract for them.

W. J. Hubert Morris, for the defendant, respondent: This agreement was indefinite and uncertain, and since it is incomplete, it is not enforceable. The Court should not uphold an incomplete agreement containing an option, which was drawn by the appellant. An ordinary mortgage contains a condition that the mortgage money shall be repaid on a specified day: 23 Halsbury, 2nd ed., p. 224, para. 328. [RIDDELL J.A.: Your point is that there cannot be a contract without absolute certainty.] Yes; who was to fix the specified date of payment? [RIDDELL J.A.: Nobody wanted a date fixed.] The case of *Dawson v. Brown* (1924), 26 O.W.N. 55, disposes of the claim that *Reynolds v. Foster*, *supra*, is distinguishable from the case at bar. It is submitted that the *Reynolds* case, and *Jackson v. Macaulay Nicolls Maitland and Company Limited*, *supra*, are directly in point and are leading authorities. *McDonald v. Murray et al.*, *supra*, on which appellant's counsel relies, went off in each Court on grounds that make it an insufficient authority for the appellant's purposes. The option here in question was not under seal and there is no consideration: *Miller v. Allen* (1912), 4 O.W.N. 346, 23 O.W.R. 527, 7 D.L.R. 438. There was no tender, and not only was tender necessary to show that the respondent was in default but payment or tender of the purchase money is, under the terms of the option, a condition precedent to the creation of a binding contract for sale. [RIDDELL J.A.: The respondent exercised great care that tender could not be made.]

J. Shirley Denison, K.C., in reply: It is submitted that this agreement is in fact an I.O.U. secured by a mortgage. [RIDDELL J.A.: Your proposition is that after the special clause was inserted in the document, both parties acted on it, and therefore it is an enforceable contract.] Yes.

Cur. adv. vult.

1st April 1943. RIDDELL J.A.:—In this appeal from the judgment of Mr. Justice Urquhart, dismissing the action, many authorities were cited in the argument on both sides, carefully and candidly discussed. For one who follows the maxim *stare decisis*, it cannot be said that the authorities are consistent and satisfactory; but it was clear to my mind that reason was on the side of the appellant, and there was no authority sufficient to displace this view.

Agreeing, as I do, with the reasoning and conclusion of my brother Kellock, I do not think it necessary to set out my own at length, but content myself with saying that I agree with him.

The appeal will be allowed with costs throughout, and the prayer of the plaintiff granted.

FISHER J.A. agrees with KELLOCK J.A.

KELLOCK J.A.:—This is an appeal from the judgment of Urquhart J., sitting without a jury, dated 29th January last, dismissing the action. The action was brought for specific performance of an agreement for the purchase of certain premises described in a lease between the parties, dated 25th June 1940. Under this lease the respondent demised to the appellant certain store premises in the township of East York, for a term commencing 1st August 1940, and expiring 31st July 1942. The lease contained the following provision:

“It is understood that Thomson Groceries Ltd. are given the option to purchase these premises for the Sum of Seven Thousand Three Hundred and Seventy-five dollars (\$7375.00) during the life of this lease—Terms \$4000.00 cash, balance 1st Mortgage Interest at 5% per annum.” Both parties executed the lease.

The option to purchase contained in the lease was exercised by the appellant by letter to the respondent of 5th May 1942, to which the respondent did not reply.

For the respondent it is contended that as the terms and duration of the mortgage are not provided for, the agreement

is too indefinite to be considered in law a completed agreement. In addition The Statute of Frauds, R.S.O. 1937, c. 146, is pleaded.

Apart from the lease and the letter there were no discussions between the parties as to any term of the option or the agreement resulting from its acceptance, and there is no contention between the parties as to what was agreed upon. The case, therefore, is not one of an agreement incomplete in fact because of something left to be the subject-matter of future discussion, or future arrangement, nor is it one where there is a dispute as to what had in fact been agreed upon. The issues, therefore, are whether the agreement constituted by the acceptance of the option is valid in law, and as to the application of The Statute of Frauds.

In my opinion the contract in question here is valid in law, and may be enforced. I think that is the result of *McDonald v. Murray et al.* (1883), 2 O.R. 573; 11 O.A.R. 101. In that case action was brought upon an agreement for the sale by the plaintiff to the defendants of certain premises for the sum of \$60,000, upon the terms that the defendants should pay the plaintiff the sum of \$4,000 on the execution of the agreement, \$40,795 within sixty days from the date of the agreement, the balance of \$15,205 to remain on mortgage at 7 per cent. The \$4,000 was paid, and the action was brought to recover the \$40,795 after the expiration of the sixty days. One of the objections at the trial was that as no time was mentioned for payment of the mortgage, the defendants could not know how to perform the agreement. The trial judge granted a non-suit, because, in his view, the defendants were obliged to tender a conveyance before action, and had not done so. He did so, however, without prejudice to the plaintiff's right to bring a fresh action. On appeal to a Divisional Court, Wilson C.J. and Galt and Osler JJ., where the objection above referred to was again argued, the appeal was allowed, the Court being of opinion that tender of a conveyance before action was not necessary, and that the contract was valid. A new trial was accordingly directed. On appeal to the Court of Appeal it was held that the plaintiff was obliged to tender a conveyance before suit, and accordingly the appeal was allowed and the judgment at the trial was restored.

On examining the printed appeal case, which I have done, I find that no reference is made in the appellant's "reasons for

appeal" to the Court of Appeal to the objection as to the absence in the agreement of any time for payment of the mortgage. However, Patterson J.A., at p. 122, approves of the judgment of Wilson C.J. in the Divisional Court, and both Burton J.A., at pp. 112-113, and Rose J., at p. 142, recognize the contract as valid. I think the correct view of the case is as stated by Boyd C. in *Martin v. Jarvis* (1916), 37 O.L.R. 269, at 274, 31 D.L.R. 740, except that I do not think it is correct to say that "*McDonald v. Murray* was finally tried out" in (1884), 5 O.R. 559. This is the report of the result of the new trial ordered in 2 O.R. 573, from which an appeal was pending when the case in 11 O.A.R. was heard: see 11 O.A.R. 101, foot note. Any judgment on the new trial would fall with the judgment of the Court of Appeal in 11 O.A.R. This, however, does not detract from the effect of the judgments in 2 O.R. and 11 O.A.R. as above mentioned. With regard to the question as to the time for payment of the mortgage, the judgment of the Divisional Court was that this was a matter in the discretion of the mortgagor. This aspect of the matter was not dealt with by the Court of Appeal, although, as already mentioned, Patterson J.A. accepts this view.

Even if *McDonald v. Murray et al.* is not to be regarded as deciding what I think it does, nevertheless I think the authorities support the proposition that a contract such as that here in question is a valid one. I think the law is accurately set forth by Armour J. (as he then was) in *Lightbound et al. v. Warnock* (1882), 4 O.R. 187 at 196:

"The mortgage in the case in judgment was to be given as security for the debt, and whether it was to bear interest or not, there being no agreement on the subject, or when it should be payable, there being no agreement as to this, were details which the law would supply, and the agreement being silent as to them would not render it incapable of being enforced."

In Fisher and Lightwood's *Law of Mortgages*, 7th ed., p. 10, the authors say:

"It is usual in a mortgage to insert a covenant for payment to repay the principal sum, with interest, on the day fixed for payment, and also to pay interest after default so long as the security shall subsist. But this was never a necessary part of a mortgage, which, in itself implies a loan, and therefore . . . a debt recoverable by action, and bearing interest even though

none is expressly reserved. In the absence, however, of a covenant or bond, the debt is only a simple contract debt."

I do not understand the authors to mean that the instrument must fix a day for redemption, even though it contains no covenant for payment, for one of the cases referred to is *Farquhar, Bart. v. Morris* (1797), 7 T.R. 124, 101 E.R. 889, a case of a bond, where no time for payment was fixed, but where, none the less, it was held an action lay for the debt. I refer also to *Purdom v. Northern Life Assurance Co. of Canada*, 63 O.I.R. 12 at 32, [1928] 4 D.L.R. 679, affirmed, *sub nom. Fidelity Trust Company of Ontario v. Purdom and The Northern Life Assurance Company of Canada*, [1930] S.C.R. 119, [1930] 1 D.L.R. 1003, and *Sutton v. Sutton* (1882), 22 Ch. D. 511 at 515, 520. There are many cases of equitable mortgages where no time for payment is mentioned. I see no reason for any different requirement in the case of a legal mortgage. See *Fitzgerald's Trustee v. Mellersh*, [1892] 1 Ch. 385 at 389; *Hoofstetter v. Rooker* (1895), 22 O.A.R. 175, affirmed (1896), 26 S.C.R. 41; *Dighton v. Withers* (1862), 31 Beav. 423, 54 E.R. 1202. It may be stated that an agreement of the character here in question is not open to objection on the ground that it is a mere executory agreement to lend money: *Starkey v. Barton*, [1909] 1 Ch. 284; and further that it is not an objection that no date for closing the transaction appears in the writing, and was not, in fact, the subject of agreement: *McKenzie v. Walsh*, 61 S.C.R. 312, 57 D.L.R. 24, [1921] 1 W.W.R. 1017.

In my opinion *Reynolds v. Foster* (1912), 3 O.W.N. 983, 21 O.W.R. 838, 3 D.L.R. 506, affirmed (1913), 4 O.W.N. 694, 23 O.W.R. 933, 9 D.L.R. 836, is not an authority with respect to the case at bar.

As appears from the judgment of the trial judge, 3 O.W.N. 983, there was evidence in that case showing that there was contention between the parties with respect to the duration of the mortgage. In his judgment in 4 O.W.N. 694 at 695, Meredith J.A. points out that it was not argued in that case that the date of payment of the mortgage could be implied, but that it was intended by each to be entirely a matter of agreement between them; in other words, that the parties in that case had designedly left their agreement incomplete with respect to this term, which was to be the subject of subsequent negotiation. The argument addressed to the Court in that case was that no time having

in fact been agreed upon, the mortgagor himself was at liberty to fix the time of payment, notwithstanding the evidence just referred to. The late Chancellor has pointed out these considerations with regard to *Reynolds v. Foster* in *Martin v. Jarvis* (1916), 37 O.L.R. 269 at 273, 31 D.L.R. 740. It would be difficult to argue successfully, and the Court did not accept the argument in that case, that one party to an agreement could supply a term which both parties had left to be the subject of future mutual agreement. Such a case differs entirely from the case where the parties have made a complete contract in fact and the only question is one of law, namely, whether that which the parties have agreed upon is enforceable in law, and whether the agreement is in a form complying with the provisions of The Statute of Frauds. It will thus be seen that *Reynolds v. Foster* is quite a different case from *McDonald v. Murray et al.*, and for that reason the former is not an authority with respect to the case at bar.

With regard to the form of the mortgage, apart from the time for payment, the absence of any agreement with respect to terms was not regarded as an objection in *Peterson v. Bitzer*, 62 S.C.R. 384, 63 D.L.R. 182, [1922] 1 W.W.R. 141. The view of the learned trial judge in *Reynolds v. Foster*, 3 O.W.N. 983 at 986, was that in such case the mortgage would be in the form provided by The Short Forms of Mortgages Act. Having regard to the definition of "mortgage" in The Mortgages Act, R.S.O. 1937, c. 155, s. 6 of that Act will apply, and a covenant for payment will be implied. It was held in *Cummings v. Doel* (1907), 10 O.W.R. 331 at 332, that under an agreement for sale calling for a mortgage to be given back to the vendor by the purchaser, a mortgage "in a condition complete and ready for registration" was required. In my opinion the mortgage in this case should be according to The Short Forms of Mortgages Act, R.S.O. 1937, c. 160.

The question then arises as to the time of payment of the mortgage moneys. In my opinion the mortgage will be payable on demand. Where an implied liability arises from the existence of the debt in cases where there is no covenant for payment in the mortgage, such liability is enforceable on demand: *Sutton v. Sutton* (1882), 22 Ch. D. 511 at 515; *King v. King* (1735), 3 P. Wms. 358, 24 E.R. 1100, 18 R.C. 1; *Farquhar v. Morris* (1797), 7 T.R. 124, 101 E.R. 889; 41 Corpus Juris 396; *Higgins v.*

McLachlan (1881), Russ. Eq. Rep. (N.S.) 441. The same result, in my opinion, obtains in the case of a mortgage where a covenant for payment is implied by statute. The learned trial judge thought that while the agreement in writing in this case might be interpreted to mean a mortgage on demand, neither party had in contemplation any such thing. He refers to the fact that the solicitor for the appellant had in fact drawn a five-year mortgage. There is no evidence as to what the parties had in mind, apart from what they put in writing. The question then is merely as to what follows in law from that. The act of the appellant's solicitor in drawing a five-year mortgage does not affect the matter. In *McDonald v. Murray et al.*, *supra*, the Divisional Court held that the mortgage moneys in such a case would become payable at the discretion of the mortgagor, but the Court of Appeal did not pass upon this question. None of the authorities to which I have referred seems to have been cited to the Divisional Court, and I cannot agree with its view on this point.

With respect to the defence of The Statute of Frauds, it follows that if the whole contract, apart from terms implied by law, is in writing, the statute is complied with. I think that is so in this case.

It is also argued on behalf of the respondent that the appellant cannot succeed in the absence of tender, before action, of the purchase moneys, and also, presumably, of the mortgage. As the provisions of The Vendors and Purchasers Act, R.S.O. 1937, c. 168, s. 4 apply to this contract, it was the duty of the respondent to prepare the conveyance, and his default in this respect precludes him from setting up any default on the part of the appellant as to payment of the purchase moneys or tender of the mortgage: *Consolidated Press Ltd. v. Gibson et al.*, [1933] O.R. 458, [1933] 3 D.L.R. 64. Moreover, the learned trial judge finds that any tender on the part of the appellant would have been an idle form. Tender in such circumstances is excused: *Hunter v. Daniel* (1845), 4 Hare 420 at 433, 67 E.R. 712.

The respondent further contends that, the lease not being under seal, there is no consideration for the option, and reference is made to *Miller v. Allen* (1912), 4 O.W.N. 346, 23 O.W.R. 527, 7 D.L.R. 438. I do not think this is arguable: *Matthewson v. Burns* (1913), 30 O.L.R. 186, 18 D.L.R. 287, reversed (1914), 50 S.C.R. 115, 18 D.L.R. 399. It is to be observed that the learned judge who tried the case of *Miller v. Allen* was of a different view

in the later case of *Bennett v. Stodgell* (1914), 6 O.W.N. 163 at 164. I refer also to the final disposition of this last mentioned case in (1916), 36 O.L.R. 45 at 48, 54 and 61, 28 D.L.R. 639.

In my opinion a binding agreement was effected by the exercise of the option by the letter of 5th May 1942. I also think that payment by the appellant of any portion of the purchase moneys was not a condition precedent to the existence of an enforceable contract. I do not think there is anything to the contrary in *Cushing et al. v. Knight* (1912), 46 S.C.R. 555, 6 D.L.R. 820, 2 W.W.R. 704, referred to in the judgment in *Miller v. Allen* (1912), 4 O.W.N. 346, 23 O.W.R. 527, 7 D.L.R. 438. In my opinion, on that point the case at bar is governed by the decision in *Mills v. Hayward* (1877), 6 Ch. D. 196.

The appeal should be allowed with costs, and there should be judgment for the appellant, as asked, with costs.

Appeal allowed and judgment directed for plaintiff.

Solicitor for the plaintiff, appellant: Robert W. R. Shearer, Toronto.

Solicitors for the defendant, respondent: Morris and Morris, Toronto.

[COURT OF APPEAL.]

Roberto v. Bumb.

Sale of Land—Agreement in Writing—Alteration, after Execution, by Vendor's Agent—Insertion of Amount of Deposit to be Paid by Purchaser—Whether Alteration Material—Enforcement by Purchaser.

After the execution of an offer to purchase, and acceptance by the vendor, the vendor's agent inserted in the document the amount of the deposit which had been paid to the agent by the purchaser. The vendor later repudiated the agreement, and the purchaser sued for specific performance. *Held*, the plaintiff was entitled to succeed.

Per Laidlaw J.A.: The alteration was not material, since it in no way affected the position of the purchaser, or prejudiced the vendor. In any case, the vendor could not avoid performance because of this alteration, since it had been made by his agent, for whose action, in the circumstances, he was responsible. There was nothing in the circumstances of the case to cause the Court, in its discretion, to withhold specific performance, and in the conditions of modern society and business, actual performance of an agreement was preferable to a judgment for damages. Although the writ in the action had been issued before the time fixed for performance by the defendant, the plaintiff should not be deprived of his remedy on this account, since his cause of action was complete at the time of the trial, and the dismissal of the action on this ground would result in multiplicity of proceedings, since the plaintiff could immediately sue again. Although the terms of the contract were sufficiently wide to include fixtures, which were admittedly not to be included in the sale, the contract could be rectified by the Court in this respect, and, as rectified, should be enforced.

Per Robertson C.J.O., who agreed in other respects with Laidlaw J.A.: The alteration was a material one, but in the circumstances the vendor was not entitled to take advantage of it.

Per Gillanders J.A., dissenting: The alteration was material, and had the effect of avoiding the contract. Further, the agreement, even as rectified by the exclusion of fixtures, was too vague and indefinite to be specifically enforced.

AN appeal by the defendant from the judgment of Plaxton J., sitting without a jury, in an action for specific performance of an agreement for the sale of land by the defendant to the plaintiff.

The following statement of facts is taken from the judgment of LAIDLAW J.A.:

This is an appeal from a judgment for specific performance of a contract for the sale by the appellant to the respondent of premises known as 326 King Street in the city of Welland. In accordance with the usual form of judgment, the Court declared the terms of an agreement in writing dated the 1st day of October 1942, to be a binding contract between the parties, and the appellant was ordered to execute and deliver a proper conveyance or transfer of all his interest in the premises to the respondent.

On 1st October 1942, a real estate agent, Louis Szabo, obtained from the respondent an "offer to purchase" the premises from the appellant. The "offer" was prepared on a printed form containing blank spaces for completion by the user. All of such spaces were filled in with the exception of one which was for the purpose of shewing the amount of deposit, if any, made by the purchaser to the agent. The respondent signed the offer and it was then taken by Szabo to the appellant. There was some explanation by Szabo to the appellant and his wife of the terms and conditions. Both the appellant and his wife then signed the printed form of acceptance, containing a covenant on their part with the purchaser duly to carry out the terms and conditions set forth. At the same time the appellant and his wife signed an additional form of agreement with the agent Szabo, to pay him a commission on the sale price and authorized "the said Agent to retain the said commission or any part thereof out of any deposit paid to him by the purchaser on account of the purchase price". Szabo then returned to the respondent and received from him a cheque for \$250 containing the notation on its face "Pertaining Deposit on Bldg. No. 326 King St." He thereupon filled in the blank space in the "offer to purchase" by writing the words and figures "Two hundred & fifty dollars (\$250.00)". He gave one copy of the document, as completed, to the respondent, and again went back to the appellant. He testifies that he told him "There is the agreement, Mr. Bumb, and I got a cheque, \$250 deposit on the building, and it is made out in my name but we could fix that to-morrow". According to Szabo the appellant replied, "Keep the agreement too. When I want it I will go and ask you."

The "offer to purchase" as signed by the respondent contained a term that the sale was to be completed on the 15th day of October 1942, but before that date the appellant repudiated the contract. Action was then commenced by writ of summons issued on the 8th October 1942.

4th March 1943. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and LAIDLAW JJ.A.

J. R. Cartwright, K.C. (*H. A. Rose, K.C.*, with him), for the defendant, appellant: The appellant has been placed in the position of one who refuses to perform a contract, and against whom a decree of specific performance has been awarded. It has been

his contention throughout all the proceedings that he never entered into an enforceable contract. [ROBERTSON C.J.O.: Have you satisfied yourself that you can be sued for specific performance prior to the date on which the contract was to be completed?] There is a reference to this point in 31 Halsbury, 2nd ed., p. 401, para. 468, and likewise in Fry on Specific Performance, 6th ed., pp. 495-497, although Fry's statement is not as direct and emphatic as that contained in Halsbury.

The main points on which the trial judgment is disputed are as follows: (1) It is clear under the authorities that any alteration of a document after it has been signed by the appellant prevents any action being brought upon it. (2) The remedy sought is an equitable one and the Court, having a discretion, should not exercise it in favour of the respondent in this case because the appellant is illiterate and unable to read. (3) On the evidence, the appellant was drinking at the time of the agreement and he entered into a bargain which on the face of it is so detrimental to his own interest, and puts him in such a position of hardship, that a court of equity should not grant a decree of specific performance. [ROBERTSON C.J.O.: Does the judgment or statement of claim define the contract any more clearly than the written agreement itself? For example, the agreement makes no mention of the fixtures.] No; that is an additional reason for refusing a decree of specific performance. The evidence would seem to indicate that the appellant had never contemplated selling the building without the fixtures. For him to do so would in effect mean that he was losing the investment he had made in them. (4) The contract is too vague to be specifically enforced, since it did not include equipment. (5) The action was prematurely brought, as mentioned in the statement of defence.

It is of particular importance that an alteration was made in the agreement after the appellant had signed it, and it is not suggested that his attention was called to such a change. It is well established that an alteration in such circumstances renders the agreement void and unenforceable: 7 Halsbury, 2nd ed., pp. 205, 206, paras. 286, 288. The leading case on this subject is *Suffell v. The Bank of England* (1882), 9 Q.B.D. 555. It is unimportant that the alteration was made by a stranger who was in lawful possession of the agreement. The respondent was present and it was with his concurrence that the figures were

written in by the agent. The change is material because until that blank in the agreement was completed the terms of payment were not fixed under the agreement. All that was told the appellant, who cannot read, was that the second agreement was for 2½ per cent. and that it was for the agent's commission. [ROBERTSON C.J.O.: The amount of the commission does not necessarily fix the amount of the deposit.] According to the cases, a deposit is something quite different from an instalment of the purchase price: *Hall v. Burnell*, [1911] 2 Ch. 551. The instrument is different in a material respect. How can one imply authority to an agent to decide the amount of the deposit? [ROBERTSON C.J.O.: The agent, having obtained the respondent's signature to the offer, went to the appellant to obtain his acceptance of the offer, and the blank was there at that time. Obviously, it was intended to be filled in. Why would not the respondent be justified in assuming that the blank was left that way in order to be filled out by himself or the agent?] If the argument is correct that the alteration was material, it makes no difference how innocent the respondent may have been, the agent did change it. The cases make it plain that mistake is no defence to a plea of this nature. [LAIDLAW J.A.: What do you say to the fact that the agent returned to the appellant and that he in effect agreed to the change?] While there is no finding on that particular point, there is no suggestion that the agent was changing the agreement. Nobody knew of this alteration until the trial. There is no evidence to show that commission was mentioned until after the alteration. The agency contract was not read to the defendant. It was at the trial that the respondent's counsel moved to plead this. [LAIDLAW J.A.: What would be the effect of the conversation with the appellant as to alteration of the document? Is it your argument that the second conversation did not amount to ratification?] [ROBERTSON C.J.O.: I have in mind something in the nature of a holding out. The agent might be considered to be acting on behalf of the appellant, for which reason the respondent might be entitled to assume that the document should be completed in whatever form the agent considered correct.] The agent is often as much the agent for the purchaser as for the vendor. No estoppel could arise here because there is no reason to assume that a man who is an agent for the purpose only of finding a purchaser for the property, has any authority to change the contract or alter docu-

ments. [ROBERTSON C.J.O.: There is some significance to the fact that the altered document was not the one signed by the appellant, and it might be easier for the respondent to be misled, since the alteration was made over his signature.] It is submitted as a matter of law set forth in many cases, that a change in circumstances such as these, makes the document unenforceable as a written instrument. By virtue of the authorities, it is asked that the agreement be not enforced, since it would create a great hardship for the appellant. The contract does not carry out the agreement according to the intention of the parties. The evidence indicates that the fixtures were to be excluded. The contract is in vague terms and the action upon it was prematurely instituted. It is inconceivable that the appellant in his right senses would have disposed of the building without the contents. This act of gross improvidence in conjunction with the illiteracy of the appellant, his probable state of intoxication, and the fact that the agreement was not read over to him, leads irrefutably to the conclusion that the appellant did not really understand what he was doing when he signed the document. In view of all the circumstances, specific performance should not be decreed.

S. S. MacInnes, for the plaintiff, respondent: Any change that was made was not a material one, and furthermore, it was made by the agent of the vendor. The learned trial judge's finding that the writing in of \$250.00 was not a material alteration should be upheld. The appellant was considering selling the property for some time and negotiated with his agent for that purpose. There is an implied authority for the agent to act as he did on behalf of the vendor: *Silverman v. Legree* (1919), 45 O.L.R. 107, 47 D.L.R. 713. [ROBERTSON C.J.O.: There was no alteration of a document in the *Silverman* case.] The evidence is clear that the defendant knew the meaning of the document and the full import of affixing his signature thereto. [ROBERTSON C.J.O.: He did not know that he was to pay a year's taxes in consideration of the use of the premises for two months.] [GILLANDERS J.A.: The agent was not authorized to change the terms of the contract. Where does one find specific authority to fix the amount of the deposit on behalf of the appellant?] *Silverman v. Legree*, *supra*, holds that an agent has implied authority to accept a deposit. [ROBERTSON C.J.O.: In that case,

the agent had nothing to say concerning the amount of the deposit. He simply had the right as agent of the vendor to accept the deposit at the time he obtained the offer. There is no parallel with the case at bar.] [LAIDLAW J.A.: What would have happened if the agent thought he was entitled to fill in the blank for the whole amount, and took the entire purchase price?] [ROBERTSON C.J.O.: Even if it is conceded that the agent had the right to receive the deposit, that is not the right to fix the amount and write it into the document.] The Court should not be asked to find that any hardship would be suffered by the appellant. There is no evidence that any of the equipment, excluded from the contract for sale, is new. If there are discrepancies in the contract, one must not overlook the varying nationalities of the interested parties, which would explain some peculiarities in the agreement. The contract is not so vague that there is not a clear description of the property intended to be sold: *Inkpen v. Keeping et al.*, 14 M.P.R. 400, [1940] 1 D.L.R. 728; [ROBERTSON C.J.O.: That is not quite the point here, since the objection is that the property described should have excluded the fixtures.] This Court has power to rectify a written contract: *United States of America et al. v. Motor Trucks, Limited*, [1924] A.C. 196 at 200, [1923] 3 D.L.R. 674. [GILLANDERS J.A.: Your statement of claim asks for specific performance of this contract.] If the written contract does not represent the property purchased, then there has been mutual mistake, and it should be rectified.

With reference to the claim that this action was brought prematurely, it is submitted that at the date the writ was issued, there had been a distinct repudiation by the appellant.

J. R. Cartwright, K.C., in reply: We ask leave to amend the statement of defence by saying that the written agreement does not represent the true contract between the parties. [ROBERTSON C.J.O.: Respondent's counsel wishes to amend the statement of claim to ask for rectification of the contract to exclude the fixtures.] If the respondent succeeded in having the contract rectified, the Court would be making, in reality, a new contract for the parties: *Lord Walpole v. Lord Orford* (1797), 3 Ves. 402 at 419, 30 E.R. 1076. This would be a proper case for rectification only if it was intended before the offer was signed that the

subject of the contract should be the building without fixtures, and a clause to that effect was left out in error. The Court might then rectify the written contract.

The test in *Silverman v. Legree* (1919), 45 O.L.R. 107, 47 D.L.R. 713, was whether the vendor was obligated to pay back to the purchaser a deposit wrongly kept by the vendor's agent: Mechem, *Law of Agency*, 2nd ed., p. 570, s. 798. This action should be for damages rather than for a decree of specific performance, since one party is said to have repudiated before the date the contract matured.

Cur. adv. vult.

6th April 1943. ROBERTSON C.J.O.:—I concur in the result of this appeal reached by Laidlaw J.A. I desire to say only this, that I am not prepared to hold that the alteration of respondent's offer by the vendor's agent, after its acceptance, was not a material alteration. In my opinion, the alteration was material. I agree, however, that in the circumstances respondent was entitled to assume that the vendor's agent, when he returned with the vendor's written acceptance of the offer, had the vendor's authority to fill in the amount of the deposit that respondent was to make. There was no advantage to respondent in the alteration.

On the argument I was impressed with appellant's contention that the written contract, adjudged to be specifically performed, did not set out the true contract in that fixtures were not excepted. It is abundantly plain that the fixtures were not to be included in the sale, for respondent had offered a price several thousand dollars higher for the premises with fixtures, and that offer was refused. The pleadings do not raise the point, however, and on its being raised by appellant in argument, it was conceded by respondent that the judgment should be amended in that respect. In my opinion, justice will be done by directing rectification of the contract to except the fixtures from the property to be sold and conveyed, and by directing a corresponding amendment to be made in the judgment for specific performance. As so rectified, I do not think the contract is too vague to be enforced in this manner.

GILLANDERS J.A. (*dissenting*): The main facts, clearly stated in the judgment of Mr. Justice Laidlaw, need not be repeated.

With some hesitation I think that the alteration made in the contract by the agent Szabo should under the circumstances be viewed as a material alteration. I am not forgetting that Szabo had obtained from the appellant written authority "to retain the commission or any part thereof out of any deposit paid to him by the purchaser on account of the purchase price." The contract itself as executed by the parties made no provision for a deposit. Szabo's authority to act on behalf of the appellant was limited. He had no authority to vary the terms of the contract between the parties. The mainspring of Szabo's industry in the matter was the natural desire to earn his commission. His authority to act as agent for the appellant was strictly confined in scope. The contract as executed by the parties provided for the payment of the purchase price but made no provision for a deposit. There is a difference between a deposit and the purchase price: *Hall v. Burnell*, [1911] 2 Ch. 551. In any event, the agent had no authority to fix the amount of the deposit for the appellant. There being no provision for a deposit in the agreement as executed, there was nothing on which the authority of the agent to retain his commission out of any deposit paid could operate before the alteration was made. To make such alteration was material and to the prejudice of the appellant. The agreement is thereby avoided: *Suffell v. The Bank of England* (1882), 9 Q.B.D. 555.

There is one aspect of the case to which little, if any, attention was paid at the trial, and which seems to me of some importance in view of the evidence. The appellant had purchased the lands and buildings in question in November, 1940, for \$10,000. The building was not then used or fitted as a restaurant. The evidence shows that after purchase the appellant spent or obligated himself in upwards of \$6,000 for repairs, restaurant fixtures and equipment. Of this amount approximately \$2,000 covered repairs to the building, and the balance was for fixtures and equipment.

As the trial judge finds, before the agreement for sale now in question was completed, there had been some discussion between the parties "The defendant finally offering to accept \$19,000 for the property including the fixtures and furnishings, and the plaintiff to pay \$16,000. They were unable to agree. The plaintiff before leaving the defendant eventually offered to pay

him \$12,000 for the property without the fixtures and furnishings, but the defendant did not then accept his offer."

The contract which was subsequently completed through the efforts of the agent Szabo, and of which the respondent sought specific performance, covered "all and singular the premises situate on the East side of King Street in the City of Welland, known as Victoria Restaurant, number 326."

The judgment in appeal contains, *inter alia*, a declaration that the agreement in issue is a binding contract for the sale by the appellant to the respondent of all the lands and premises in the pleadings mentioned for the sum of \$12,000 and orders the appellant to deliver a proper conveyance of all his interest in the lands upon payment of the balance due.

Fixtures are part of the land and a conveyance of the land passes the fixtures unless special stipulation is made. The evidence respecting the nature of the appellant's fixtures and equipment is very sketchy, but it is apparent that they included restaurant booths, soda fountain, lunch counter, stove and steam plate and various items such as furniture and other chattels.

Counsel for the respondent does not contend that any fixtures are intended to be covered by the agreement. While it appears that they may be of substantial value, the extent to which they are built in or attached to the freehold is not explained in the evidence.

It is clear that the respondent should not have judgment for specific performance of the contract in the terms of the judgment in appeal. There is a substantial question as to whether he should be granted specific performance at all. If the respondent were otherwise entitled to succeed, and the parties did mutually make a clear agreement, but there was error in reducing this agreement to writing, the Court might, in a proper case, decree specific performance of the contract so varied as to represent the true contract between the parties: *Murray v. Parker* (1854), 19 Beav. 305, 52 E.R. 367; *Thompson v. Hickman*, [1907] 1 Ch. 550 at 561.

In the case at bar I incline to the view that the contract between the parties is not sufficiently clear and complete to warrant an order for specific performance. It is admitted in a general way that it should not include fixtures or equipment. Whether these fixtures are limited to those installed by the appellant, or whether others, if any, should be excluded, is not

clear. The fixtures in question are not specified, and nothing is said about removal or damage to the realty that might result from such removal. Under the circumstances the appeal should be allowed and the action for specific performance dismissed with costs.

LAIDLAW J.A. [after setting out the facts as above]:—Counsel for the appellant argues:

(1) That the contract is avoided because a material alteration was made in it after it was signed;

(2) That the remedy of specific performance is equitable and the discretion of the Court should not be exercised in favour of the respondent because (a) the appellant is illiterate and the document was not read over to him; (b) the appellant was drinking heavily before and at the time he signed the document; and (c) the bargain entails such a hardship that a court of equity would refuse a decree of specific performance;

(3) That the respondent should be left to the remedy of damages, and none have been suffered by him;

(4) That the action could not properly be commenced or maintained before the time fixed by the contract for performance; and

(5) That the contract is too vague.

The first point to be determined is whether Szabo made a material alteration in the contract when he filled in the blank space in the offer to purchase, by showing the amount of deposit paid to him. The principle upon which a material alteration operates as a discharge of the contract is said to be that "no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event, when it is detected", per Lord Kenyon C.J. in *Master et al. v. Miller* (1791), 4 Term. Rep. 320 at p. 329, 100 E.R. 1042, affirmed 5 Term Rep. 367, 101 E.R. 205. In *Suffell v. The Bank of England* (1882), 9 Q.B.D. 555, Cotton L.J., at p. 572, says the rule is to ensure that the instrument is the same and to prevent the parties substituting that which was not the same but a different instrument. A material alteration is one which varies the rights, liabilities or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed, or may otherwise prejudice the party bound by the deed as originally executed.

Gardner et al. v. Walsh (1855), 5 El. & Bl. 83 at 89, 119 E.R. 412; *Aldous v. Cornwell* (1868), L.R. 3 Q.B. 573 at 578; *Bishop of Crediton v. Bishop of Exeter*, [1905] 2 Ch. 455.

But what amounts to a material alteration depends on the character of the instrument, *Suffell v. The Bank of England*, *supra*. " . . . one must know exactly what the instrument is, what the alteration is, and what the general effect is", per Jessel M.R., at p. 563. The instrument there in question was part of the currency and the number which was altered formed a material part of the instrument. The decision depended partly upon general law and partly upon considerations affecting the peculiar nature of a Bank of England note, per Jessel M.R., at p. 559; see also *Hong Kong and Shanghai Banking Corporation v. Lo Lee Shi*, [1928] A.C. 181.

After Szabo filled in the space in the offer to purchase by showing the amount of deposit received by him, the terms of the offer were not substantially changed. It was not a new offer, nor was a different instrument substituted for the one which had been previously signed. It continued to be the same instrument, and the only effect of the addition was to alter the balance which would be owing by the purchaser to the vendor upon completion of the sale. The appellant was not prejudiced in any way, and the legal effect of the instrument as originally expressed was not varied. I am therefore of the opinion that there was no material alteration which would discharge the contract. In any case I think the performance of the contract cannot be avoided by the appellant because the addition therein was made by his agent, and in my opinion the appellant is responsible for his act in the circumstances of this transaction: *Pattinson v. Luckley* (1875), L.R. 10 Ex. 330. The offer was made to the appellant through Szabo as agent, and the appellant expressly authorized him to retain his commission "out of any deposit paid to him by the purchaser on account of the purchase price." The instrument was still in the possession of Szabo as agent for the appellant at the time the addition was made, and it was not until after the blank was filled in that a copy was delivered to the respondent. Moreover the appellant was subsequently told by Szabo that he had received the deposit, and he made no apparent objection. It seems to me to be contrary to all equity to hold that an addition to the contract in such circumstances would entitle the appellant to avoid his obligation and

covenant to carry out its terms and conditions and thus destroy the rights of the respondent.

It is argued that the Court should not exercise its judicial discretion to grant a decree of specific performance in this case. The remedy is said to be "special" and "extraordinary". But if the contract is valid in form and has been made between competent parties and is unobjectionable in its nature and circumstances, specific performance is in effect granted as a matter of course: *Hall v. Warren* (1804), 9 Ves. 605 at 608, 32 E.R. 738. The learned trial judge accepted the evidence of Szabo as against the evidence of the defendant and the other defence witnesses. Therefore, while the appellant was illiterate, it should be found that he understood the terms and conditions of the offer before he accepted it. He may have been drinking heavily before he signed the document, but he was then sober. It may be, too, that specific performance involves hardship to him but that alone cannot enable him to escape the contractual obligation he covenanted to carry out and perform.

The respondent did not wait until after the time fixed for completion of the sale, *viz.*, 15th October 1942, but commenced this action on 8th October, after the appellant had repudiated the contract. The respondent had a right to keep the contract open as a subsisting and effective contract and the sole question is whether he could properly maintain an action for specific performance before the time for performance by the appellant.

It is clear that the renunciation by one of the parties before the time for performance has come does not of itself put an end to the contract, but it discharges the other, if he so chooses, and entitles him at once to sue for the breach. *Frost v. Knight* (1872), L.R. 7 Ex. 111; *Hochster v. De la Tour* (1853), 2 El. & Bl. 678, 22 L.J.Q.B. 455, 118 E.R. 922; *Dullea v. Taylor* (1873), 34 U.C.Q.B. 12; *Dalrymple v. Scott* (1892), 19 O.A.R. 477; *Neostyle Envelope Co. v. Barber-Ellis Limited* (1914), 6 O.W.N. 43, 16 D.L.R. 871, reversing 4 O.W.N. 1585, 12 D.L.R. 385; *The American National Red Cross v. Geddes Brothers*, 61 S.C.R. 143, 55 D.L.R. 194, [1921] 1 W.W.R. 185; *Martin v. Stout*, [1925] A.C. 359. The cause of action was not complete when the proceedings were commenced in the court, but when the matter came on for trial the appellant was in default and all conditions precedent to relief then existed. The respondent was prepared to show an existing contract, that he was willing and anxious

to fulfil his obligations, and that the appellant was in default. I think that a court of equity would not permit an appellant to avoid the contract merely because the action was started prematurely, nor would the respondent be thus deprived of his equitable right to a decree of specific performance, if he were otherwise entitled to it. Such a court would not look favourably on such defence. Moreover no real benefit could be had by the appellant by giving effect to this objection to the proceedings, because the respondent would be free to commence a new action and to make the same claim as in the present one. The result would be multiplicity of proceedings concerning the matter and that should be avoided: The Judicature Act, R.S.O. 1937, c. 100, s. 15(h).

Counsel argues that the respondent should be left to the remedy of damages. It has been said that where damages are sufficient compensation for breach of contract, specific performance should not be decreed. But I think that where the substance and essentials of a valid contract are sufficiently defined the Court ought to enforce actual performance of it unless there are special circumstances for not doing so. The affairs of modern business and society depend increasingly upon a strict fulfilment of obligations voluntarily undertaken by parties, and I think that a person seeking relief from his contractual burdens must clearly establish to the satisfaction of the Court such circumstances as render discharge by him unnecessary or inexpedient. That has not been done in this case.

Finally it is urged that the provisions of the contract are too vague and uncertain to be the subject of a decree for specific performance. While the contents of the offer to purchase could be more clearly expressed, the meaning and intention of the parties is not in substantial doubt, and there is no such obscurity or ambiguity as would disentitle the respondent to actual performance of the undertaking on the part of the appellant.

No provision is made in the contract as to fixtures, and counsel for the appellant argues that the written instrument does not show the terms of the agreement the respondent seeks to enforce. This objection does not appear in the statement of defence or in the proceedings at the trial. But there is no real uncertainty as to the terms of the agreement made by the parties. The fixtures were not part of the property for which the offer to purchase was made. Counsel for the respondent admits

this to be a fact. Therefore any defect in the document is one relating to identification only of the premises as described, and can be cured. The Court has jurisdiction to bring the written instrument into conformity with the terms of the agreement. *Craddock Brothers v. Hunt*, [1923] 2 Ch. 136; *United States of America et al. v. Motor Trucks, Limited*, [1924] A.C. 196, [1923] 3 D.L.R. 674; *Butti v. Lambertus* (1929), 35 O.W.N. 307. See also The Judicature Act, s. 15(h), *supra*. Having rectified the contract, "There seems no reason on principle why a Court of equity should not at one and the same time reform and enforce a contract": per the Earl of Birkenhead L.C., in *United States of America v. Motor Trucks, Limited*, *supra*, at p. 201. When this point was raised on the hearing of the appeal, counsel for the respondent applied for an order that the contract be rectified and asked for specific performance of the contract as rectified. If such an order is made the appellant seeks leave to amend the statement of defence. I think that the respondent should have leave to amend the statement of claim to ask that the contract be rectified so as to except the fixtures from the property described therein. The appellant may amend the statement of defence in answer thereto in such manner as counsel may be advised. Upon such amendments being made there should be judgment for specific performance of the contract as rectified and for the costs of the action, to be paid by the defendant.

The appeal should therefore be dismissed with costs.

Appeal dismissed with costs subject to a variation; GILLANDERS J.A. dissenting.

Solicitors for the plaintiff, respondent: Raymond, Spencer & Law, Welland.

Solicitors for the defendant, appellant: Rose & Tyrrell, Welland.

[COURT OF APPEAL.]

Imperial Oil Limited v. The City of Ottawa.

Taxation -- Municipal Business Assessment -- Manufacturer Opening Premises where its Products and Others Sold directly to Public—Whether Assessable as Manufacturer or Retailer—The Assessment Act, R.S.O. 1937, c. 272, s. 8, subss. (1)(e), (1)(i), (4).

Where a manufacturer occupies premises in which it sells, directly to the public, its own goods and goods manufactured by others, and in which nothing is manufactured, it is entitled to be assessed, in respect of those premises, as for a retail business rather than as a manufacturer, even if its own goods constitute the greater part of the goods there sold. The phrase "carries on the business of a retail merchant" in s. 8(4) of The Assessment Act, R.S.O. 1937, c. 272, is to be construed in its ordinary meaning, and there is no reason for restricting it to cases where the greater part of the goods sold is manufactured by others. There is nothing in the derivation of the word "retail" to suggest that it means only re-selling.

AN appeal by way of stated case, under The Assessment Act, R.S.O. 1937, c. 272, from the judgment of Daly, Co. Ct. J., of the County Court of the County of Carleton, dismissing an appeal from the decision of a Court of Revision, affirming a business assessment. The facts are fully stated in the judgment now reported.

6th April 1943. The appeal was heard by ROBERTSON C.J.O. and FISHER and KELLOCK JJ.A.

Gordon F. Henderson, for the appellant: The crucial section of The Assessment Act, R.S.O. 1937, c. 272, which governs this appeal, is s. 8(4). Pursuant to this, the appellant should be assessed as a person carrying on the business of a retail merchant, rather than as a person carrying on the business of a manufacturer under clause (e) of s. 8(1). The appellant is unquestionably a manufacturer in so far as it makes petroleum products, but with regard to the premises presently under discussion, it is merely carrying on the business of a retail merchant. Gasoline and oil are sold directly to members of the public. [FISHER J.A.: Business is done on a retail basis.] Yes; it is necessary to look to the actual use of the premises. In 1922 the Act was amended by adding what is now s. 8(4). In the course of the judgment in *Re Studebaker Corporation of Canada Limited and City of Windsor* (1919), 46 O.L.R. 78, 49 D.L.R. 326, Magee J.A. referred to a defect in The Assessment Act. It is submitted that the amendment cured this defect and in effect overrode the *Studebaker* decision.

Gordon C. Medcalf, for the respondent: The appellant has been expressly found to be a manufacturer and there are several well-established authorities that it should be taxed according to clause (e) of s. 8(1) of The Assessment Act. Where a manufacturer sells by retail his own products on premises other than his factory premises, he is carrying on the business of a manufacturer and not the business of a retail merchant, within the meaning of The Assessment Act. It is immaterial that, in addition to sales of products of its own manufacturer, the appellant also sells goods manufactured by others, where, as is the fact, these other goods constitute less than ten per cent. of the total volume of sales: *Re Studebaker Corporation of Canada Limited and City of Windsor* (1919), 46 O.L.R. 78, 49 D.L.R. 326; *Re The City of Toronto and Belding Corticelli Ltd.*, [1939] O.R. 409, [1939] 3 D.L.R. 73; *City of Toronto v. Lever Brothers Limited*, [1942] O.R. 421, [1942] 3 D.L.R. 468; *Kelvinator of Canada Limited v. City of London*, [1942] O.W.N. 485.

The last-cited case affirms the principle in the *Belding Corticelli* case, if that principle is still sound. [ROBERTSON C.J.O.: None of these cases involved the interpretation of s. 8(4). In the *Lever Brothers* case it was held that there was no retail business carried on on the premises in question; it was that of advertising goods.]

The problem in the *Studebaker* case was that of a manufacturer who disposed of his own product while carrying on the business of a manufacturer. [ROBERTSON C.J.O.: The amendment to The Assessment Act was subsequent to the *Studebaker* case, and when the Legislature passed the amendment it must have been deemed to know the full meaning and effect of that decision. If a retail merchant can sell what he manufactures himself and still be called a retail merchant, then the statute may have referred to such a situation.] The Legislature does not employ the words “ . . . where a manufacturer sells by retail his own product” The word “also” must have some significance. S. 8(4) was introduced as an exception to the preponderating rule in subs. 3. Subs. 4 has a more limited meaning. [ROBERTSON C.J.O.: What do you suggest was the omitted case with which the Legislature was dealing in subs. 4?] The case of a manufacturer who sells his own product and other products too. [KELLOCK J.A.: Unless the manufacturer was selling 51 per cent. of a product other than his own, you claim

that he is still taxable as a manufacturer?] Yes; the results reached in the *Kelvinator* case are diametrically opposed to those reached in *Re The City of Chatham and The Canadian Leaf Tobacco Co.*, [1938] O.W.N. 265, [1938] 3 D.L.R. 430. [KELLOCK J.A.: In the *Chatham* case, the situation was somewhat different. There goods belonging to one person were stored in a warehouse belonging to another.] In the case at bar, goods are sold by retail; but the authorities establish that where this is done by a manufacturer, then it is part of his business as a manufacturer, not as a retail merchant. It is on this principle that the respondent relies, and it refutes the meaning which the appellant seeks to attribute to s. 8(4) of The Assessment Act.

Gordon F. Henderson, in reply: The question resolves itself into the true meaning of the words "retail merchant". The scheme of the statute is clear, with three classifications mentioned: manufacturer, wholesaler and retailer. The intention of s. 8(1)(e) is to relieve a manufacturer who sells his own goods by wholesale, by assessing him as a manufacturer instead of a wholesaler; the addition at the end of the subsection was for that purpose. Similarly, if he sells his own wares as a retail merchant, he should benefit by the lower assessment paid by such a merchant. To give s. 8(4) any other meaning is to nullify the effect of the enactment. The ordinary canons of construction should apply. The appellant sells small wares directly to the public from these premises, which makes him a retail merchant within the obvious meaning of that phrase.

Cur. adv. vult.

15th April 1943. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—An appeal upon a stated case under The Assessment Act, from the judgment of Judge Daly, a judge of the County Court of the County of Carleton, affirming the decision of the Court of Revision of the City of Ottawa, affirming the business assessment of the appellant as a manufacturer.

As set forth in the stated case, appellant is a manufacturer of gasoline, oil, grease and other petroleum products, and has its head office at Sarnia, and its manufacturing plants or refineries at Sarnia, and at other points in Canada. Appellant owns and occupies two premises in Ottawa, on each of which it has erected a gasoline and oil filling station. Upon these premises

appellant sells directly to the public products of its own manufacture, and also certain other things useful to motorists which are not manufactured by appellant, including batteries, spark plugs, light bulbs and fuses, tires and a number of other articles. Over ninety per cent., however, of what is sold upon the premises is of appellant's manufacture, but nothing is manufactured on the premises.

Appellant was entered on the roll in respect of these premises as carrying on the business of a manufacturer, and its business assessment is, therefore, sixty per centum of the assessed value of the premises. Appellant contends that it should be assessed in respect of these premises as carrying on the business of a retail merchant, which would carry an assessment at a lower rate.

The appeal is based upon subs. 4 of s. 8 of The Assessment Act, R.S.O. 1937, c. 272, which is as follows:

“(4) Where a manufacturer also carries on the business of a retail merchant he shall be assessed as a retail merchant in respect of any premises or of any portion of any premises which are occupied and used by him solely and only for the purpose of such business.”

This subsection was first enacted in 1922 by 12-13 Geo. V., c. 78, s. 7, subs. 2. There appear to be no reported decisions directly upon it. It is suggested that the subsection was enacted to alter the law as laid down in *Re Studebaker Corporation of Canada Limited and City of Windsor* (1919), 46 O.L.R. 78, 49 D.L.R. 326.

In the case referred to the Studebaker Corporation was a manufacturer of automobiles, with a factory and head office at Walkerville. It occupied rented premises in Windsor, where it had a show-room and sales-room, for the sale of the products of its factory directly to the public. The company contended that it should have been assessed either as a commercial agent or as a retail merchant, and not as a manufacturer. It was held, however, that the company's business had two branches, one, its manufactory proper, and the other, its show-room and sales-room, and that both were an integral part of the business of a manufacturer.

While the principle of the foregoing decision has been applied in other reported cases, none of them were cases that came

within the above mentioned subs. 4. In *City of Toronto v. Lever Brothers Limited*, [1942] O.R. 421, [1942] 3 D.L.R. 468, the County Judge held that the business carried on in the premises in question should, for the purposes of business assessment, be classed as that of a retail merchant, but on appeal it was held that that classification could not properly be applied to the business so carried on, but that it was part of an advertising plan to promote the sale of the goods that the occupant manufactured elsewhere. The proper application of subs. 4 was, therefore, not in question.

There was also cited to us the case of *Re The City of Toronto and Belding Corticelli Ltd.*, [1939] O.R. 409, [1939] 3 D.L.R. 73. The question there was whether the occupant of the premises in question should be assessed for business assessment as a wholesale merchant, or as a manufacturer, and clause (e) of s. 8(1) of The Assessment Act was the clause to be applied. There was no suggestion that subs. 4 applied.

The County Judge, in the present case, was of opinion that where a manufacturer carries on business on premises where he sells products of his own manufacture, and also a product or products manufactured by others, directly to the public, he may be held to "carry on the business of a retail merchant" only if the preponderance of business so carried on is that of selling products not of his own manufacture, or if a portion of such premises is used solely for the sale of products not manufactured by himself. The County Judge appears to have been of the same opinion as the County Judge from whom an appeal was taken in the *Studebaker* case, and who said (46 O.L.R. at p. 80): "The business of a retail merchant is the selling of the product of another bought by the merchant for the purpose of resale." There is nothing in the judgment on appeal in the *Studebaker* case that can be said to adopt or approve this definition, and I am unable to agree with it. As the expression is commonly used, selling by retail is selling in small quantities, as distinguished from selling by wholesale, or in gross. The word comes to us through the French, and signifies the sale of commodities in small quantities. There is nothing in its derivation to suggest that it means re-selling, nor is that its proper meaning in modern use. (See Murray's New English Dictionary). In fact, if the business of a retail merchant extends only to the re-sale of commodities manufactured by and purchased from another, no

purpose would appear to be served by the enacting of subs. 4. It was very properly conceded by counsel for the respondent that if a person who happened to be a manufacturer also carried on, separately from his manufacturing business, the business of selling by retail goods that were manufactured by others, and not by himself, he would be entitled, even if subs. 4 of s. 8 had never been enacted, to be assessed as a retail merchant in respect of any premises occupied and used by him solely and only for the purpose of such business of selling by retail. That being so, it would seem necessary to conclude that the Legislature intended, by enacting subs. 4, to accomplish something that was not already provided for.

Counsel for the appellant sought to strengthen his argument, based on what he claimed it to be the plain meaning of subs. 4, by discovering a consistent purpose on the part of the Legislature in the several references to manufacturers in s. 8 of The Assessment Act. He found in subs. 1(e) the provision for a person carrying on simply the business of a manufacturer, and in the same clause the provision for the case of a manufacturer who also carried on the business of selling by wholesale the goods of his own manufacture, and who, none the less, escapes assessment at the higher rate imposed on a wholesale merchant. Then subs. 4 provides for the manufacturer who carries on the business of a retail merchant, and who, in respect of the latter business, is entitled to assessment at the lower rate imposed on a retail merchant. The only consistent purpose that I can see running through these several provisions is that whenever there is a choice of two evils, the manufacturer is given the least. Perhaps that is all that counsel meant. One is not assisted by a consideration of these other provisions in arriving at the proper interpretation of subs. 4.

In my opinion the language of the subsection is to be given its ordinary, everyday meaning. The business carried on by the appellant in the premises in question, as described in the stated case, is the business of a retail merchant, notwithstanding that appellant is also the manufacturer of the commodities that are principally sold there. There are doubtless many such businesses carried on in Ottawa, and appellant, although a manufacturer, is entitled in respect of these premises to be assessed at the same rate as others carrying on a similar business.

The appeal should be allowed, and the assessment roll should be amended by applying to the assessed value of the premises in each case the per centum rate applicable in Ottawa to a retail merchant. The appellant is entitled to its costs.

Appeal allowed with costs.

Solicitors for the appellant: Gowling, Mactavish & Watt, Ottawa.

Solicitor for the respondent: Gordon C. Medcalf, Ottawa.

[HOPE J.]

Rex ex rel. Tolfree v. Clark et al.

Quo Warranto—When Remedy Available—Usurpation of “Office or Franchise”—Membership in Legislative Assembly—The Judicature Act, R.S.O. 1937, c. 100, ss. 141-145.

Membership in a Legislative Assembly is not an office, franchise or liberty, as those terms are defined in connection with proceedings in the nature of *quo warranto*, and such proceedings are accordingly not properly brought against members of such an assembly.

Courts—Inherent Powers—Preventing Abuse of Proceedings—Rule 124.

Quite apart from Rule 124, the Court possesses an inherent jurisdiction to stay proceedings where no reasonable cause of action is disclosed. *In re Norton's Settlement; Norton v. Norton*, [1908] 1 Ch. 471, and other authorities, applied. It is proper for the Court to invoke this power even if it is not mentioned in the notice of motion. *Vinson v. The Prior Fibres Consolidated, Limited*, [1906] W.N. 209, referred to. Although the power should be sparingly used, it may with propriety be invoked in exceptional cases. *Attorney-General of the Duchy of Lancaster v. London and North Western Railway Company*, [1892] 2 Ch. 274, applied. *Semble*, if the circumstances are such that the continuance of an action would amount to an abuse of the process of the Court, it is frivolous and vexatious, within the meaning of Rule 124.

Constitutional Law—Powers of Provincial Legislatures—Amendment of Constitution — Extension of Term of Existing Legislature — The British North America Act, s. 92(1)—The Legislative Assembly Act, R.S.O. 1937, c. 12, s. 3—The Legislative Assembly Extension Act, 1942 (Ont.), c. 24.

Semble, the power of a Province to amend its own constitution extends to a prolongation by the Legislature of the life of an existing Legislative Assembly. Since such an Act becomes law only on receiving the royal assent, it cannot be said to affect the office of the Lieutenant-Governor, within the exception contained in s. 92(1) of The British North America Act, particularly if, as here, the statute expressly preserves all royal prerogatives, and the power of the Lieutenant-Governor to dissolve the Assembly before the date fixed by the statute for its termination. *In re The Initiative and Referendum Act*, [1919] A.C. 935, 48 D.L.R. 18, [1919] 3 W.W.R. 1, distinguished.

Constitutional Law — Immunities and Privileges of the Crown and Legislature—Subpoena to Servant of Legislature, during Session, to Attend for Examination and to Produce Crown Papers.

A *subpoena duces tecum* directed to the Clerk of the Legislative Assembly and requiring him to attend for examination and to produce papers which are the property of the Crown will be set aside if proper authority has not been obtained for the production of the papers, and if, the Assembly being then in session, its consent has not been secured to his attendance.

A MOTION, by two of three respondents, to strike out an originating notice in the nature of *quo warranto*, as being frivolous and vexatious, and as disclosing no reasonable cause of action. The circumstances are more fully stated in the judgment.

1st April 1943. The motion was heard by HOPE J. in Weekly Court at Toronto.

C. R. Magone, K.C., for the applicants, respondents in the original proceedings, and for the Attorney-General for Ontario.

No one for the third respondent.

V. Evan Gray, K.C., and *W. A. Toogood*, for the relator, *contra*.

17th April 1943. HOPE J.:—The relator, on behalf of His Majesty the King, served an originating notice of motion in the nature of *quo warranto*, returnable in Weekly Court at Osgoode Hall on 12th April 1943, requiring the three respondents to show cause why each of them, as is alleged by the relator, does “unlawfully exercise or usurp the office, functions and liberties of a member of the Legislative Assembly of Ontario during and since the month of February, 1943, contrary to the provisions of the British North America Act (sec. 85 of Vict., cap. 3, whether or not the same are lawfully amended by the provisions of The Legislative Assembly Act (R.S.O. 1937, cap. 12, s. 3), notwithstanding the provisions of an ‘Act to Extend the Duration of the present Legislative Assembly Act’ (6 Geo. VI, cap. 24).”

Following the service of the said notice of motion, the solicitor for the relator served upon the Attorney-General for Ontario and the Attorney-General for Canada a notice that upon the said motion there would be brought in question the constitutional validity of “An Act to Extend the Duration of the present Legislative Assembly” (6 Geo. VI, c. 24) and of s. 3 of The Legislative Assembly Act (R.S.O. 1937, c. 12).

Further and preliminary to the hearing of the said motion, the solicitor for the relator served upon Major Alex C. Lewis,

K.C., Clerk of the Legislative Assembly and Chief Election Officer for the Province of Ontario, a subpoena to attend for examination on 3rd April 1943, and to produce certain copies of votes and proceedings of the Legislative Assembly and certain writs of general election of members of the Legislative Assembly in the year 1937, for the Electoral Districts of Windsor-Sandwich, Ontario and Simcoe East, together with the returning officers' statements for the same election in the same districts.

Thereupon the applicants herein, namely, the said James H. Clark and Gordon D. Conant, served a notice of motion upon the relator returnable before me in Weekly Court on 1st April, for an order under Rule 124 of the Consolidated Rules of Practice, striking out the notice of motion in the nature of *quo warranto* "on the grounds that it is frivolous and vexatious and that it discloses no reasonable cause of action for the following reasons:

"1. that matters relating to elections of members of the Legislative Assembly are within the exclusive jurisdiction of Parliament and are a privilege of Parliament.

"2. that there is no jurisdiction in any court to deal with the validity of elections of members of the Legislative Assembly unless such jurisdiction is specifically given by Act of the Legislature.

"3. that there is no jurisdiction in this Honourable Court to entertain a motion in the nature of *quo warranto* to test the validity of the election of a member of the Legislative Assembly of Ontario.

"4. upon such ground as counsel may advise."

The notice was also of a motion to set aside the subpoena issued to Alex C. Lewis as aforesaid "upon the ground that the issue of such subpoena is oppressive and an abuse of the process of the Court, for the following reasons:

"1. that the said Alex C. Lewis is subpoenaed as a servant of the Crown and the Crown is not subject to the Rules of Practice regarding Examination for Discovery or Discovery of Documents.

"2. that the said Alex C. Lewis is an officer of the Legislative Assembly, which Assembly is now in Session and that during such Session officers of the Legislature are exempt from attending as witnesses before the courts."

Under The Judicature Act, R.S.O. 1937, c. 100, s. 1(a) "action" shall mean a civil proceeding commenced by writ or in such other manner as may be prescribed by the Rules.

By s. 141 of The Judicature Act, *quo warranto* proceedings, which were heretofore commenced by writ or by information, are now commenced by notice of motion.

In this motion the applicants are attacking the proceedings and pleadings under each clause of Rule 124, which permits the Court to strike out if (a) the pleading does not disclose a reasonable cause of action, or (b) the action is shown to be frivolous or vexatious. Should either one of these conditions be met, then the original proceedings may be struck out or dismissed.

Pending my determination of the motion, the proposed examination of Alex C. Lewis was postponed *sine die* by consent of both counsel. Subsequently, *viz.*, on 10th April, in the presence of counsel for all parties, I delivered an oral judgment with reasons setting aside the subpoena served. It was admitted that the Legislative Assembly was then still in session. Counsel for the relator expressed the opinion that the term "session" referred only to the daily session or sittings of the House. However, I think it is commonly accepted that "session" refers to the whole term from the time the Assembly first convenes in any one year until it terminates its sittings for the year. This is the sense in which "session" is used in The Legislative Assembly Act, R.S.O. 1937, c. 12; see s. 70.

In May's Parliamentary Practice, 13th ed., at p. 120, it is stated:—

"No officer of either house should be served with a subpoena to give evidence concerning any proceedings in Parliament, or to produce documents in his custody, until leave has been given to him to attend."

It was plainly evident on the argument that no such leave had been sought or given for Major Lewis to attend. Moreover, it is abundantly clear that the documents which the witness was directed to produce upon his examination are documents which are the property of the Crown, and that no authority for their production was sought or obtained from the proper authority. It is accepted that in such a situation, records and documents should not be produced without leave having been first obtained: *Tribune Newspaper Co. v. Fort Frances Pulp & Paper Co. et al.*, 40 Man. R. 401, [1932] 2 W.W.R. 443, [1932] 4 D.L.R.

179 at 183-190. Moreover, it was argued by Mr. Magone that all of the information contained in the documents set out in the *subpoena duces tecum* is contained in the Ontario Gazette and is otherwise available under The Evidence Act, R.S.O. 1937, c. 119.

Be this as it may, if my subsequent disposition of the first branch of the motion before me as hereinafter set out be correct, the setting aside of the subpoena is a negligible question.

Counsel for the applicant herein strongly argued that *quo warranto* proceedings are not applicable to members of Parliament or of the Legislative Assembly.

While for the disposition of the present motion it is not requisite to pass upon the validity of the Act of 1942 extending the duration of the Legislative Assembly, and I have no intention of doing so, yet in view of the argument of the relator's counsel upholding the propriety of the *quo warranto* proceedings, it is necessary for a proper appreciation of the reasonableness of such proceedings to contemplate the enactment alleged by the relator to be the cloak of a usurpation, and other statutes fixing the duration of various parliaments.

By s. 85 of The British North America Act, it was enacted that the Legislative Assembly of Ontario should continue for "four years from the day of the return of the writs for choosing the same . . . and no longer." This limitation on the duration of the Legislature was carried in precise language into The Legislative Assembly Act of Ontario as it has been enacted and re-enacted from time to time, until 1930, when, by the Ontario statute, 20 Geo. V, c. 4, s. 2, the term was extended to five years and no longer. Then by 6 Geo. VI, c. 24, it was enacted that the then present Assembly should continue until 19th October 1943, and that it should not be necessary to hold any general election to choose members of the Assembly until such date, without, however, affecting or abridging any prerogative of the Crown or the power of the Lieutenant-Governor to dissolve the Assembly sooner.

Clause 1 of s. 92 of The British North America Act gave to the Legislature of each Province the power to amend from time to time, "notwithstanding anything in this Act", the constitution of the Province except as regards the office of Lieutenant-Governor. The counsel for the relator contended that this last cited provision of The British North America Act did not empower the Legislature to extend the duration of the Legislative As-

sembly, since by its so doing the Crown would be deprived of its prerogative to summon a new Assembly at the expiry of the normal term of four or five years as the case might be.

This argument, in my opinion, seems to overlook the fact that the Legislature is constituted of the Lieutenant-Governor representing the Crown and the Legislative Assembly, consisting of elected members representing the people. The Act of Extension is not an Act solely of the Legislative Assembly, but of the Legislature, which therefore includes the concurrence of the Lieutenant-Governor. An Act only becomes operative as law on receiving the royal assent. Hence a surrender, if any, of the particular prerogative of the Crown, as exercised by the Lieutenant-Governor, resulting from the Act of Extension in question has been with the concurrence of the Crown by reason of the royal assent thereto. It should not, moreover, be overlooked that s. 2 of the 1942 Act expressly preserves any prerogative of the Crown and the power of the Lieutenant-Governor to dissolve the Assembly.

In *In re The Initiative and Referendum Act*, [1919] A.C. 935, 48 D.L.R. 18, [1919] 3 W.W.R. 1, the Judicial Committee of the Privy Council discussed the constitution of Canada, both Dominion and Provincial. The following extracts from the judgment delivered by Viscount Haldane (at p. 941) might be noted:

"The framework of the Constitution of Canada was enacted in 1867 by the Imperial Parliament in order to give effect to the desire expressed in the Resolutions adopted by the Conference of Canadian and other delegates held at Quebec . . . The object was to form . . . a Dominion with a constitution similar in principle to that of the United Kingdom."

Later on the same page: "Part V of the Act established analogous Constitutions for the Provinces. For each of these there was to be a Lieutenant Governor . . . the Lieutenant-Governor is as much the representative of His Majesty for all purposes of Provincial Government as is the Governor-General for all purposes of Dominion Government."

And again at p. 943: "The references their Lordships have already made to the character of the office of Lieutenant-Governor, and to his position as directly representing the Sovereign in the province, renders natural the exclusion of his office from the power conferred on the Provincial Legislature to amend the

constitution of the Province. The analogy of the British Constitution is that on which the entire scheme is founded, and that analogy points to the impropriety, in the absence of clear and unmistakable language, of construing s. 92 as permitting the abrogation of any power which the Crown possesses through a person who directly represents it. For when the Lieutenant-Governor gives to or withholds his assent from a Bill passed by the Legislature of the province, it is in contemplation of law the Sovereign that so gives or withholds assent. Moreover, in accordance with the analogy of the British Constitution which the Act of 1867 adopts, the Lieutenant-Governor who represents the Sovereign is a part of the Legislature."

Then dealing with the particular legislation which had been passed in the Province of Manitoba, and which was under review in that case, Lord Haldane said, at p. 944: "Thus the Lieutenant-Governor appears to be wholly excluded from the new legislative authority. These considerations are sufficient to establish the ultra vires character of the Act."

This is a vastly different situation than is created by the legislation attacked by the relator herein. In the legislation now in question, there is no attempt wholly to exclude the Lieutenant-Governor from the scheme of government.

What was observed by Lord Watson in *Fielding et al. v. Thomas*, [1896] A.C. 600, C.R. [11] A.C. 278, 5 Cart. 398, during the argument before the Privy Council (quoted in Lefroy, *Legislative Power in Canada*, p. 699), has been recognized in many cases as being fully established and accepted, namely:

"I take it under the power given to the provincial legislature by the statute of 1867, the provincial legislature had the same power to alter and amend its Constitution by its own legislative Act, as the Imperial parliament of Great Britain possessed at that date. It could give to itself any power which the parliament of Great Britain could constitutionally have given."

This same proposition is to be found in Lefroy's *Canada's Federal System*, at p. 64:

"Neither the Dominion parliament nor provincial legislatures are, in any sense, delegates of, or acting under any mandate from, the Imperial parliament. When the British North America Act enacted that there should be a legislature for each province, and that its legislative Assembly should have authority to make laws for the province and for provincial purposes in

relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from, or as agents of, the Imperial parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial parliament, in the plenitude of its power possessed, and could bestow." *Hodge v. The Queen* (1883), 9 App. Cas. 117, was the earliest of repeated judgments of the Privy Council cited as authority for the foregoing statement.

Later, at p. 67, the same author states:

"This supremacy of legislatures under our Constitution is, indeed, one of the points in which, in the words of the preamble of the British North America Act, it is a 'Constitution similar in principle to that of the United Kingdom'. For, as Professor Dicey says, in his *Law of the Constitution* (3rd ed., at p. 37), 'the Sovereignty of Parliament is (from a legal point of view) the dominant characteristic of English political institutions.' "

In the light of these observations, may I briefly refer to other legislation, both Imperial and Canadian, regarding the duration of Parliament or Legislative Assemblies as the case may be.

In England, the first enactment as to a definitive term for the duration of Parliament is to be found in the Act for the Frequent Meeting and Calling of Parliaments, 6 W. & M., c. 2, passed in 1694, by which the time of continuance was fixed for a period of "three Years at the farthest". In 1715 the Septennial Act, 1 Geo. I, stat. 2, c. 38, was passed and provided that " . . . this present Parliament, and all Parliaments that shall at any Time hereafter be called, assembled or held, shall and may respectively have Continuance for seven Years, and no longer." This statute remained effective and without change for almost two hundred years. Then The Parliament Act, 1911, 1-2 Geo. V, c. 13, s. 7, amended the Septennial Act by substituting the word "five" for the word "seven" therein. Then by several Acts, the last of which was in 1918, the very Parliament which had in 1911 reduced the life of Parliament to "five years and no longer" prolonged its own life from time to time until eventually it had sat for nearly eight years.

In Canada during the first World War, a prolongation of the life of the Dominion Parliament was effected by the intervention of the Imperial Parliament with an amendment to The British North America Act upon a request by resolution of the Dominion Parliament. However, there can be found in The British

North America Act no provision as to amendment of its constitution by the Dominion Parliament similar to that given to the Provinces by s. 92(1). On the other hand in Canada the Quebec Legislature in 1881 passed an Act, 44-45 Vict., c. 7, extending the duration of the Legislature from four years, prescribed by s. 85 of The British North America Act, to five years. There does not seem ever to have been any question raised as to the constitutionality of this Quebec extension. By s. 88 of The British North America Act, it was enacted that:

“The constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the Union until altered under the authority of this Act”

Nova Scotia continued to have four-year Legislatures from Confederation until 1900 when by R.S.N.S. 1900, c. 2, s. 9, the time was extended to five years.

New Brunswick (as had been the case before Confederation) continued to have four-year Legislatures until 1902 when by 2 Ed. VII, c. 8, the time was extended to five years and two months.

In 1918 the Legislature of the Province of Ontario effected a temporary extension of its duration owing to war conditions.

With these various Acts in mind, and in particular those of the Imperial Parliament, it is of particular interest to observe the opinion of such a distinguished author as Professor Dicey in his *Law of the Constitution* with respect to the Septennial Act, which he concludes with the following, at pp. 46 and 47 (9th ed.):

“The peculiarity of the Act was not that it changed the legal duration of Parliament or repealed the Triennial Act; the mere passing of a Septennial Act in 1716 was not and would never have been thought to be anything more startling or open to graver censure than the passing of a Triennial Act in 1694. What was startling was that an existing Parliament of its own authority prolonged its own legal existence. Nor can the argument used by Priestley (*Essay on Government*, 1771, p. 20) and in effect by the protesting Peers, ‘that Septennial Parliaments were at first a direct usurpation of the rights of the people; for by the same authority that one Parliament prolonged their own power to seven years, they might have continued it to twice seven, or like the Parliament of 1641 have made it perpetual,’ be treated as a blunder grounded simply on the ‘ignorant assumption’ that the

Septennial Act prolonged the original duration of Parliament. The contention of Priestley and others was in substance that members elected to serve for three years were constitutionally so far at least the delegates or agents of their constituents that they could not, without an inroad on the constitution, extend their own authority beyond the period for which it was conferred upon them by their principals, *i.e.*, the electors. There are countries, and notably the United States, where an Act like the Septennial Act would be held legally invalid; no modern English Parliament would for the sake of keeping a government or party in office venture to pass say a Decennial Act and thus prolong its own duration; the contention therefore that Walpole and his followers in passing the Septennial Act violated the understandings of the constitution has on the face of it nothing absurd. Parliament made a legal though unprecedented use of its powers. To underrate this exertion of authority is to deprive the Septennial Act of its true constitutional importance. That Act proves to demonstration that in a legal point of view Parliament is neither the agent of the electors nor in any sense a trustee for its constituents. It is legally the sovereign legislative power in the state, and the Septennial Act is at once the result and the standing proof of such Parliamentary sovereignty."

It should not be overlooked that aside from the reservation of the Crown prerogatives and the power of the Lieutenant-Governor from the operation of the 1942 Act, and in the light of any further possible extensions which may be sought by the Legislative Assembly hereafter, there always exists as a safeguard against unwarranted prolongation, the right of the Lieutenant-Governor, in his exercise of the royal prerogative, to refuse assent to an enactment. Exigencies of grave purport may arise from time to time, such as war conditions or national emergency, which may render the holding of a general election temporarily unwise. Thus continuance of the duration of a Legislative Assembly as part of the machinery of government may become temporarily not only a highly desirable matter in the public welfare but a matter of vital importance. Any unwarranted exercise of the sovereign power of the Legislature for ulterior or party political motives can well be prevented by the withholding of the necessary assent by the Lieutenant-Governor to any bill for such purpose. Moreover, as earlier stated, the Extension Act of 1942 expressly preserves the prerogatives of the Crown

and the powers of the Lieutenant-Governor. One of these prerogatives is that of a forced dissolution at the instigation of the Crown if, as Prof. Keith says, the Crown thinks it "necessary in the public interest", "necessary for giving the will of the people its just course." This necessity might arise where a Cabinet sought to "cling to office by prolonging the duration of Parliament" indefinitely. In such an eventuality, the power of the Crown to force dissolution may well be one of the few safeguards against a dictatorship, and a forced dissolution would be the only possible constitutional means of preserving the rights of the people.

I have reviewed, probably at too great length, the history of various Acts extending the duration of Parliament and Legislatures, not, as I have earlier said, for the purpose of determining the validity of this Act, but to determine the reasonableness of the cause of action in the relator's proceedings, and the propriety of exercising the inherent rights of the Court. Quite aside from the jurisdiction conferred by Rule 124, the Court is possessed of inherent jurisdiction to stay proceedings on the ground that the case discloses no reasonable cause of action (per Vaughan Williams L.J. in *In re Norton's Settlement; Norton v. Norton*, [1908] 1 Ch. 471 at 478). This inherent jurisdiction of the Court has been exercised: see *Chatterton v. Secretary of State for India in Council*, [1895] 2 Q.B. 189; *Salaman v. Secretary of State in Council for India*, [1906] 1 K.B. 613.

In *Orpen v. Attorney-General for Ontario*, 56 O.L.R. 327 at 332, [1925] 2 D.L.R. 366, Riddell J. stated:

"The power left in the Court by the Ontario Judicature Act, sec. 16(f), and asserted by Rule 124, of staying or dismissing any action which is plainly frivolous or vexatious or which discloses no reasonable cause of action, is simply that inherently possessed by the Court to prevent abuse of its process. Lord Watson, giving the judgment in the Privy Council case of *Haggard v. Pelicier Frères*, [1892] A.C. 61, at pp. 67, 68, says:

"Their Lordships hold it to be settled that a Court of competent jurisdiction has inherent power to prevent abuse of its process, by staying or dismissing, without proof, actions which it holds to be vexatious. In *The Metropolitan Bank, Limited et al. v. Pooley* (1885), 10 App. Cas. 210, 214, the Lord Chancellor, (the Earl of Selborne), speaking with reference to the dismissal of an action on that ground, said that "the power

seemed to be inherent in the jurisdiction of every court of justice to protect itself from the abuse of its own procedure." The same principle was again laid down by the House of Lords in *Lawrance v. Norreys et al.* (1890), 15 App. Cas. 210. In that case the Appeal Court had refused to allow proof, and dismissed the action, and Lord Herschell observed: "It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases." . . . But, although the power is inherent and is certainly not diminished by anything in statute or rule, it must be carefully and sparingly exercised."

In *Keewatin Power Co. Ltd. v. Keewatin Flour Mills Co. Ltd.*, 59 O.L.R. 406, [1926] 4 D.L.R. 531, it was held by the Court of Appeal that as the pleadings disclosed fully and precisely the relief which the defendants claimed through the Attorney-General as against the Crown there was no reason why the questions raised should not be disposed of upon summary application.

Upon the hearing of a motion under Rule 124, it is proper for the Court to invoke this inherent jurisdiction even although the notice of motion may not mention the same: *Vinson v. The Prior Fibres Consolidated, Limited*, [1906] W.N. 209. Although it has been well recognized both here and in England that both the inherent power and the power conferred by the Rule should be exercised sparingly, and that its exercise should be guarded with the utmost care, yet it is equally clear that it may with propriety be invoked in exceptional cases. " . . . the object of the rule is to stay cases which ought not to be launched—cases which are obviously frivolous or vexatious, or obviously unsustainable." Per Lindley L.J. in *Attorney-General of the Duchy of Lancaster v. London and North Western Railway Company*, [1892] 3 Ch. 274, also *vide Electrical Development Co. of Ontario Limited v. Commissioners for Queen Victoria Niagara Falls Park* (1917), 40 O.L.R. 480.

Assuming that all the facts and constitutional arguments advanced by the relator's counsel are true, and also correct in law, I can conceive of no more fitting action or exceptional case than the present for the exercise of the Court's jurisdiction, both inherent and under Rule 124, to dismiss or quash the original motion on the ground of no reasonable cause of action.

I am therefore of the opinion that the continuance of these proceedings is in the nature of an abuse of the process of the Court and that as such they are frivolous and vexatious, although I do not wish to have it understood that I suggest for one moment that an unnecessary and unduly prolonged continuance of the duration of the Legislative Assembly may not well be a matter of the very greatest importance to the people of the Province.

But this still leaves for discussion Mr. Magone's basic ground for his application to quash, *viz.*, that proceedings in the nature of *quo warranto* do not lie against members of the Legislative Assembly. *Quo warranto* proceedings have, since the Statute of Gloucester, 1278, been based upon statutory authority which is at present found in The Judicature Act, R.S.O. 1937, c. 100, ss. 141 to 145. S. 141 reads in part as follows:

" . . . all proceedings against any person who . . . is alleged unlawfully . . . to usurp any office, franchise or liberty . . . which have heretofore been instituted or taken by writ of *quo warranto*, or by information in the nature of a writ of *quo warranto*, hereafter shall be instituted and taken . . . by notice of motion calling on the person against whom the proceeding is taken to show cause why he unlawfully exercises or usurps such office, franchise or liberty."

This section deals with those proceedings "which have heretofore been instituted . . . " and therefore it is necessary to consider the use to which the writ of *quo warranto* or the information in the nature of a writ of *quo warranto* have been utilized in the past, and furthermore to note the person against whom such proceedings may be taken, *viz.*, one who usurps "any office, franchise or liberty".

In Blackstone's Commentaries, Book II, at p. 37, it is said: "Franchise and liberty are used as synonymous terms; and their definition is a royal privilege, or a branch of the king's prerogative, subsisting in a subject." They must be acquired by a grant from the King. So long as it is attached to the Crown, it is called "prerogative" but when granted to a subject it is called a "franchise." An "office" is defined by Blackstone as "a right to exercise a public or private employment and to take the office and emoluments thereunto belonging . . . whether public, as those of a magistrate, or private, as bailiffs, receivers and the like."

The original notice of the relator is brought against each of the three respondents as "a member of the Legislative Assembly of Ontario". Can membership in the Legislative Assembly of the Province fall within either of the terms "office" or "franchise"? Here I believe it is necessary to digress and consider the nature of such membership.

On a reference to The Legislative Assembly Act, R.S.O. 1937, c. 12, it will be noted that at no place is membership in the Legislative Assembly referred to as an "office" under the Crown. Reference is variously made to a "member" resigning his "seat", not his "office". The only use made of the word "office" in this Act is in s. 15(1) and (2) referring to "a member of the Assembly by becoming a member of the Executive Council, or by accepting any other office", and in subs. 2 "holding the office of President of the Council, Attorney-General", etc. However, the relator's attack is not with respect to the exercise or usurpation by the respondents of any of such offices or any other office under the Crown.

To appreciate the nature of the respondents' position as members of the Legislative Assembly, due regard must be given to the fact that the Legislature of Ontario is in all respects within its jurisdiction the equivalent of and analogous to the Imperial Parliament.

24 Halsbury, 2nd ed., para. 294, p. 176, states:

"The Parliament of the United Kingdom of Great Britain and Northern Ireland consists of the Sovereign and the three Estates of the Realm, namely, the Lords Spiritual and the Lords Temporal, who sit together in the House of Lords, and the elected representatives of the people, who sit in the House of Commons." Similarly the Legislature of Ontario consists of the Lieutenant-Governor, representative of the Sovereign, and the elected representatives of the people who sit in the Legislative Assembly. In England under the theory of the Constitution, Parliament is supreme:

"It can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections. It can, in short, do every thing that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament." Blackstone, Commentaries, Book I, p. 161.

To me, it would appear to be incongruous to suggest that an elected representative of the people thus being a member of the Legislative Assembly, and at the same time and as such a constituent element of the Provincial Parliament, could be said to hold an office or a franchise or liberty under the Crown.

It is unnecessary, I believe, for me to go into the earlier history of the use of *quo warranto* proceedings, which has been so concisely summarized by Lord Reading C.J. in *Rex v. Speyer*; *Rex v. Cassel*, [1916] 1 K.B. 595 at pp. 609 *et seq.* There Lord Reading, after a review of the earlier history, accepted the opinion delivered by Tindal C.J. and adopted by the House of Lords in *Darley v. Reg.* (1845), 12 Cl. & F. 520 at 537, 8 E.R. 1513, as the starting-point when considering the present law relating to *quo warranto*. The oft-times quoted words of Tindal C.J. were:

“ . . . after the consideration of all the cases and dicta on this subject, the result appears to be, that this proceeding by information in the nature of *quo warranto* will lie for usurping any office, whether created by charter alone, or by the Crown, with the consent of Parliament, provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others.”

Lord Reading then proceeds to state that the “test to be applied is whether there has been usurpation of an office of a public nature and an office substantive in character, that is, an office independent in title”, and further continues:

“It establishes that, whereas formerly a *quo warranto* was held to lie only where there was an usurpation of a prerogative of the Crown or of a right of franchise, a proceeding by information in the nature of *quo warranto* has long since been extended beyond that limit and is a remedy available to private persons within the limits stated by Tindal, C.J., and subject always to the discretion of the Court to refuse or grant it.”

The *Speyer* case dealt with the right of the respondent Sir Edgar Speyer to continue as a member of His Majesty's Privy Council for Great Britain. The respondent's enjoyment of that office was not, however, contingent upon his membership in the Parliament of Great Britain, nor in fact does he appear to have held such membership. Sir Edgar's position as a Privy Councillor appeared to be solely an honour or dignity conferred upon

him by the Crown, even although such appointment did impose certain obligations of state upon the person so appointed. In a fairly exhaustive pursuit I have been unable to find any instance in England or Canada where proceedings in the nature of a *quo warranto* were brought against any member of a legislative or parliamentary body *qua* member. Many instances in which the information was held to lie and also not to lie are referred to in 9 Halsbury, 2nd ed., commencing with note (c) on p. 805.

By the adoption of the English Common Law and early statutory provisions, there has been made available, as part of the procedure of the courts of the States of the American Union, the proceedings in *quo warranto*. Only in one instance in the American reports can I find a reference to such proceedings having been brought against a member of a legislative body, namely, in *The State of Kansas v. Tomlinson* (1878), 20 Kan. 692. A perusal of this case shows that the proceedings were brought against the defendant to show cause why he should exercise or usurp a seat in the house of representatives of the legislature of Kansas. The Chief Justice of the State, in delivering judgment, stated, at p. 703:

"We are not cited to a single case in the federal or state courts, where any member of congress, or any member of a state legislature, from the foundation of the government to the present time, has been ousted by *quo warranto*. And the admission of this fact of itself, after the extensive investigation of this subject by the learned attorney-general, is almost conclusive that none can be found, and that the exercise of such power is not only unwarranted, but unknown."

Selwyn's *Nisi Prius*, vol. 2, at p. 1112, after referring to the usurpation of offices and franchises in corporations, states:

"To remedy this inconvenience, it was enacted, by 9 Ann, c. 20, s. 4, that in case any person should usurp, intrude into, or unlawfully hold and execute any of the said offices or franchises" and then proceeds in footnote (1) to explain that the offices or franchises are: "*i.e.* the offices of mayors, bailiffs, portreves, and other offices within cities, towns corporate, boroughs, and *places*, (that is, places of the same kind with those before enumerated, see 5 T.R. 879), in England and Wales, and the franchises of being burgesses or freemen. . . . 'All corporations consist of officers and freemen. This statute

was meant to extend to both.' Per Lord Mansfield C.J. in *R. v. Williams* (1757), 1 W. Bl. 93 at 95, 96 E.R. 51."

At p. 1116, Selwyn continues: "Having endeavoured to explain the general nature of the *quo warranto* information, and having set forth the alterations made by the statute of Queen Anne, in cases relating to corporate offices and franchises in corporate places, I shall proceed to inquire, what the nature of the office must be for the usurpation of which the court will grant this information. In the case of *R. v. Boyles* (1729), 2 Str. 836, 2 Lord Raymond 1559, 93 E.R. 883, it was held, that it is not necessary to set forth in the information the whole constitution of the place; or to show, whether the office is by charter or prescription. If it be alleged to be an office, which appears upon the face of the information to concern the public, this is sufficient against the person who usurps it."

The learned author then proceeds to quote from the judgment of Chief Justice Tindal in *Darley v. Reg.*, *supra*, which quotation I have already referred to as used by Lord Reading.

Chitty on the Prerogatives of the Crown, at p. 337, in dealing with the remedy of *quo warranto*, states:

"The Court, however, will not extend this remedy beyond the limits prescribed to the old writ; and as that could only be prosecuted for an usurpation on the rights or prerogatives of the Crown, so an information in the nature of *quo warranto* can only be granted in such cases". And again at p. 338 the author refers to the proceedings pursuant to the statute being against "any person usurping, intruding into or unlawfully holding any franchises or office in any city, borough, or town corporate".

I refer to the following quotations from High's Extraordinary Legal Remedies, 3rd ed. at p. 554:

"Before the statute of Anne, the information in the nature of a *quo warranto* was employed exclusively as a prerogative remedy, to punish a usurpation upon the franchises or liberties granted by the crown, and it was never used as a remedy for private citizens desiring to test the title of persons claiming to exercise a public franchise . . . Hence the information, as a means of investigating and determining civil rights between parties, may be said to owe its origin to the statute of Anne, which authorized the filing of the information . . . for usurping or intruding into any municipal office or franchise in the

kingdom . . . It was doubtless intended to be confined to such franchises as were claimed in cases affecting corporate rights, or rights to freedom in municipal corporations, and not to be extended to all offices or franchises exercised without authority from the crown within a corporation. And the word 'franchises', as used in the act, has been construed by the court of king's bench to mean only the freedom and right of membership in the corporation." Again at p. 558 the same author states:

"And the principle is now firmly established, that the granting or withholding leave to file an information, at the instance of a private relator, to test the right to an office or franchise, rests in the sound discretion of the court to which the application is made, even though there is a substantial defect in the title by which the office or franchise is held. In the exercise of this discretion, upon the application of a private relator, it is proper for the court to take into consideration the necessity and policy of allowing the proceeding, as well as the position and motives of the relator in proposing it, since this extraordinary remedy will not be allowed merely to gratify a relator who has no interest in the subject of inquiry. The court will also weigh the considerations of public convenience involved, and will compare them with the injury complained of, in determining whether to grant or refuse the application . . . The expediency of permitting it to be filed is also a proper matter for the consideration of the court, and the fact that a successful prosecution of the proceedings, which are brought to test the title to a municipal office, may result in the suspension of all municipal government in a city for a long period of time, may properly be taken into account in deciding upon the application."

In conclusion, I am of the opinion not only that proceedings in the nature of *quo warranto* do not lie against a member of the Legislative Assembly, but that the other circumstances herein reviewed warrant the exercise of the Court's jurisdiction to strike out the proceedings.

Order accordingly, with costs to the applicants herein, if demanded.

Motion granted and proceedings dismissed, with costs if demanded.

Solicitor for the respondents, applicants: C. R. Magone, Toronto.

Solicitor for the relator: W. A. Toogood, Toronto.

[COURT OF APPEAL.]

McCann v. Temiskaming Hotel Company Limited et al.

Sale of Land—Option Agreement—Payment on Account of Purchase Price—Right of Optionee to Recover this Payment if Option Not Exercised—Pleadings—Relief Claimed.

The plaintiff signed a letter respecting certain real estate, in which he said: "I hereby make you an offer of \$11,000.00 . . . and hereby request an option on same on the terms following: The sum of \$2200.00 paid cash this day . . . The balance of \$8800.00 to be paid cash on or before Saturday the 29th . . . I am to be given a clear title free from encumbrance . . . with all due dispatch after payment being made as above mentioned . . . In the event of this option not being exercised the amount paid by me shall be treated as liquidated damages and not as penalty." The defendants, at the bottom of this letter, signed a statement that they, on behalf of a company of which they were the executive officers, "hereby accept to give said option and if exercised to proceed with all due dispatch to make title to you free from all encumbrances." No further payment was made by the plaintiff.

Held, unanimously, this document, on its true construction, was a mere option to purchase, and was not a firm agreement for the sale of the land. This being the proper construction of the document, it followed that the plaintiff was not entitled to enforce it specifically.

Held, further, Laidlaw J.A. dissenting, although the statement of claim did not include a claim for the return of the \$2,200 paid, as acknowledged in the agreement, yet in the circumstances of the case that claim should be treated as one before the Court in the action, having been so treated by the trial judge; the money having been specifically paid on account of the purchase price, and not as the price of the option, the plaintiff, not having proceeded with the purchase, was entitled to recover it as money paid for a consideration which wholly failed. The concluding clause of the option could have no bearing, since the defendants had in fact suffered no damages.

AN appeal from the judgment of Plaxton J., dismissing the plaintiff's action. The facts, and the nature of the relief claimed, are fully stated in the judgments now reported.

15th March 1943. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and LAIDLAW JJ.A.

George Mitchell, K.C. (Eileen Mitchell with him), for the plaintiff, appellant: An agreement for sale of certain premises was entered into between the appellant and respondent. This was not an option, nor was time of the essence of the contract. There was an offer and an acceptance of such offer, with a consideration of \$2,200 which was part of the purchase price of the property. The agreement cannot be construed as an option, which is defined as "a right acquired by contract to accept or reject a present offer within a limited, or, it may be, reasonable time, in the future": 9 C.E.D. (Ont.) 547, Wharton's Law Lexicon 163. [ROBERTSON C.J.O.: Your first position then is that an option did not exist and there was no need for the plaintiff to do

something of a binding nature by a certain date, since he was already bound by the accepted offer to purchase; and you further contend that he should not be expected to make further payments on the property until he was certain of the title, about which he had misgivings, and until his requisitions had been satisfactorily answered.] It is submitted that the validity of the contract is doubtful by virtue of The Companies Act, R.S.O. 1937, c. 251, s. 24(m). This section is applicable to the proposed sale, for it is a sale of the assets of the company in their entirety and as a business concern. It is clear from the evidence that everything was being done with a view to winding up the affairs of the company and the case pertinent to this question is *Herrmann v. Canadian Nickel Co. Ltd.*, 64 O.L.R. 190 at 194, [1929] 4 D.L.R. 42. [ROBERTSON C.J.O.: That was a completely different case; the plaintiff was a shareholder of the defendant company.]

An agreement for sale of the company's assets and undertaking entered into by a selling committee appointed by the directors is not binding on the company unless approved by the directors and shareholders: *Peterson and Canwood Co-Operative Association Limited v. Cook*, 16 Sask. L.R. 281, [1923] 1 W.W.R. 1212. However, if the Court should find that a valid contract for sale was in existence, then we claim that it was a contract for the sale of land (the undertaking of the company being also real property), and that the ordinary rules should apply for the enforcement of such a contract. Two requisitions were made as to the title, and one of them remained unanswered. [LAIDLAW J.A.: Is it your right to insist upon a clear title prior to the payment of money under this disputed document?] [ROBERTSON C.J.O.: If the document is an option, where has damage resulted to the respondent?] This impasse has resulted solely from the respondent's own conduct. At all times the appellant was anxious and willing to perform his part of the contract and only required that the respondent put himself in a position to complete the sale. The general rule is that the purchase price is to be paid upon proof of a good title submitted by the vendor: *Foster v. Anderson* (1908), 16 O.L.R. 565 at 574. Time was not of the essence, and the vendor had ample opportunity to satisfy the proper inquiries of the purchaser: *Montreal and St. Lawrence Light and Power Company v. Robert*, [1906] A.C. 196 at 202, C.R. [1906] A.C. 227, 15 Que. K.B. 137. The equi-

table rule should have applied that the transaction would be closed within a reasonable time: 9 C.E.D. (Ont.) 574.

The relief sought by the appellant is a decree for specific performance, or in the alternative the return of the money already paid as part of the purchase price. The following cases show that although the phrase "as liquidated damages and not as penalty" appears, the money so paid should be treated as a penalty: *Townsend v. Rumball* (1909), 19 O.L.R. 433; *Boericke v. Sinclair*, 63 O.L.R. 237, [1929] 1 D.L.R. 561; *Sutherland v. Jones*, 18 Alta. L.R. 186, [1922] 2 W.W.R. 1303, 68 D.L.R. 498.

It has been established that money paid on account of the purchase price of the land is not in the nature of a guarantee for the performance of the contract by the purchaser: *March Brothers & Wells v. Banton* (1911), 45 S.C.R. 338, 20 W.L.R. 322. All of the cited cases are clear that because the phrase "liquidated damages" is used, it does not necessarily mean liquidated damages in the strict meaning of the phrase. Furthermore, the transaction enhanced the value of the property, rather than damaging the respondent's position, because it has been re-sold.

George T. Walsh, K.C., for the respondent: This document is in fact an option. [ROBERTSON C.J.O.: If it is an option, what damage has been suffered by the respondent? Surely the money paid was part of the purchase price. It seems as though you are trying to recover under the agreement as though there had been a breach of contract.] [LAIDLAW J.A.: It is your argument that the price of the option was \$2,200 and that that is clear on the face of the document itself. Is it not necessary for you to show that the money is part of the purchase price and is not liquidated damages?] The option was not to take effect until the balance of the purchase money was paid. [ROBERTSON C.J.O.: It cannot be both the price of the option and liquidated damages.] [LAIDLAW J.A.: If it is not entirely clear on the face of the document, is it permissible to consider extrinsic evidence to determine the nature and character of the document?] Yes, providing the evidence is not inconsistent with the written document. [LAIDLAW J.A.: If it is your contention that the option was given in consideration of the purchase price, the two things are completely contradictory.] [ROBERTSON C.J.O.: If this document was an ordinary agreement for sale, the money which has been paid under it is not forfeited.] [LAIDLAW J.A.: From

the document itself do you say that on 29th August the vendor could have insisted upon payment of the balance of the purchase price?] The \$2,200 which has been paid was consideration for the option; if the option was not taken, then the money was forfeited. [LAIDLAW J.A.: The issue now before the Court resolves itself into a question of whether the appellant can recover \$2,200 and whether he is entitled to a clear title before payment of the rest of the money due under the agreement.] If this document is in truth an option, the respondent is entitled to \$2,200. If on the contrary, it is an agreement, the respondent is entitled, under the authorities on the subject, to retain the money.

Eileen Mitchell, for the appellant, in reply: The appellant is entitled to either a decree for specific performance or the return of the twenty per centum of the purchase money paid by him to the respondent. [LAIDLAW J.A.: If, in law, there was no agreement, on what ground can the corporation be made liable for \$2,200?] It would be most inequitable, and an unjust enrichment, if the respondent company were allowed to retain the \$2,200 as well as the land, which has been resold at an increased value.

Cur. adv. vult.

15th April 1943. ROBERTSON C.J.O.: This is an appeal from the judgment of Plaxton J., dated 25th November 1942, after a trial before him without a jury, at Haileybury. The action was dismissed with costs, and the counterclaim was dismissed without costs, and from this judgment the plaintiff appeals.

The action arises out of the following document, which is Ex. 1:

"4th August 1942.

"Temiskaming Hotel Co. Ltd.,

"Haileybury, Ontario.

Re: Hotel Haileybury

"Dear Sirs;—

"I hereby make you an offer of \$11,000.00 for the Hotel including real estate, buildings and equipment as it stands to-day, and hereby request an option on same on the terms following:

"The sum of \$2200.00 paid cash this day, that is to say, \$1100.00 has been paid cash and I hereby hand you my cheque

for \$1100.00 to make up the amount, said cheque to be presented to my bank forthwith.

"The balance of \$8800.00 to be paid cash on or before Saturday the 29th at 12 o'clock noon (August 1942).

"Although I have my room in the hotel at the present time I hereby declare that I am not in possession as optionee.

"No inventory is to be taken and I am to be given possession upon payment as above mentioned, subject to adjustment for taxes, water rates, fire insurance premiums as of the 1st of August 1942 and rents as of the date of taking possession upon payment being made.

"I am to be given a clear title free from encumbrance of all the assets of the company with all due dispatch after payment being made as above mentioned, excepting guest account receivable which remain your property.

"In the event of this option not being exercised the amount paid by me shall be treated as liquidated damages and not as penalty.

"Yours truly,

"J. J. McCann"

"We, M. J. Conkey and Joseph A. Legris, President and Secretary-Treasurer of Temiskaming Hotel Co. Ltd. on behalf of the Company and Hotel Haileybury hereby accept to give said option and if exercised to proceed with all due dispatch to make title to you free from all encumbrances.

"M. J. Conkey"

"Joseph A. Legris"

(Corporate Seal).

Respondents had the \$2,200 referred to in the second paragraph of the document, but no more money was paid. Before the date for payment came, appellant, through the solicitor he had retained, asked for assurance on certain matters before paying the balance of the purchase price. Respondents say that full and satisfactory information on these matters was made available to appellant. This, appellant disputes. One matter related to the authority of the president and secretary-treasurer of the respondent company to bind the company by the document. Another matter was with respect to a mortgage upon the premises mentioned in the document. There was a mortgage for \$58,000 on the property, undischarged. It was obvious that

the purchase money provided for in the document was far short of \$58,000. It is said in evidence, however, that respondents had documents in the possession of Mr. Legris which authorized the discharge of the mortgage on payment of a sum that the purchase price would cover. Respondents say that they exhibited to appellant the documents relating to the discharge of the \$58,000 mortgage, and they say they also informed appellant's solicitor of the position of both the matters above mentioned and offered to permit him to examine the relevant documents, but that their offer was not availed of. There is both conflict and confusion in the evidence in relation to these matters, but, fortunately, it does not seem to be necessary to decide the rights of the disputes in this regard. There is a more fundamental difference between the parties. The balance of the purchase price was not paid on or before the time fixed by the document, and the respondents, regarding the document, Ex. 1, as a mere option, then treated the whole matter as at an end.

Appellant contends that the document is in the nature of a firm agreement to sell at the price and on the terms stated. The learned trial judge considered the document to be only an option. In this, I think he was right, although it is a strangely drawn document. In the statement of claim the appellant would appear to have claimed only such relief as would be appropriate if the document, Ex. 1, were a firm agreement of purchase and sale. In view, however, of the course of the trial, I do not think appellant should be held strictly to the statement of claim in this case, and he should be permitted to claim alternatively on the basis that he held an option only. The endorsement of the plaintiff's claim on the writ of summons includes the following:—"in the alternative to recover from the Defendants all monies paid to the Defendants". At the trial every aspect of the transactions between the parties seems to have been investigated. In the course of one of the many arguments during the taking of evidence, respondents' counsel made the following statement:—"My learned friend knows perfectly well that in his action he has an alternative clause whereby if he cannot exercise his option he gets back the \$2200." In reply to this appellant's counsel, after stating his first position based on an alleged contract of purchase, continued, "and if we are not correct we are asking for the return of our \$2200 with damages."

In beginning his reasons for judgment, the learned trial judge briefly set forth the issues, and said that the plaintiff's claim was, in substance, for specific performance of an option agreement for the purchase of the property in question, subject to delivery of a clear title, and that, in the alternative, the plaintiff sought to recover the sum of \$2,200 paid by the plaintiff in respect of the option agreement, as well as certain damages. In the course of his judgment the trial judge dealt specifically with the claim to recover the \$2,200 and found against it. This claim is also dealt with in respondents' statement filed under Rule 495. On the argument of the appeal there was a full discussion of this alternative claim of the appellant on its merits, and no objection was taken that there was no claim in the pleadings for this relief, or that it was not in issue at the trial. In these circumstances I think appellant may fairly be allowed to make any necessary amendment to the statement of claim, and that we should do as the learned trial judge did, and regard the action as, alternatively, for the recovery of the sum of \$2,200 paid.

I, therefore, proceed to deal with that claim, and in doing so I shall regard Ex. 1, not as an agreement of purchase, but as an option given by respondents to the appellant, which option appellant did not take up.

This document, Ex. 1, was drawn by the respondent Legris. He is a barrister and solicitor of standing and experience, and he was, as well, an officer of the respondent company, and was actively engaged in earlier negotiations with appellant concerning the sale of the hotel property. Appellant had no legal adviser in the taking of the option, and signed it in Mr. Legris' office, where the latter had prepared it. It is a confusing document, and is not at all in the usual form of an option. It is addressed to the respondent company, the owner, and begins with a definite offer by appellant to purchase at \$11,000. The grant of an option takes the form of an acceptance at the foot following appellant's signature. This seems to have misled appellant's solicitor, who came into the matter later, as to the true nature of the document. The initial offer of \$11,000 for the property is followed by a request for an option, and by a further statement of terms. The acceptance is "to give said option and if exercised to proceed with all due dispatch to make title to you free from all encumbrances."

It is not possible to make of this anything more than an option to appellant to purchase, but I think a large share of the responsibility for the misunderstandings that arose is to be assigned to the party by whom this document was put forward, and that it is to be held strictly to the terms of the document.

Proceeding then on the basis that Ex. 1 is an option, it is plainly expressed in the document that the \$2,200 paid by appellant to respondents on its execution is a payment in advance on account of the purchase price of the property. Respondents now contend that it was paid as the price of the option, and that it was to be applied as part of the purchase price only in the event that appellant exercised the option. There is nothing in the document to say so. Neither did any witness say that that was the intention. On the contrary, the \$2,200 paid in cash is directly applied by the document as part of the \$11,000, leaving a balance of \$8,800 to be paid on the exercise of the option and its conversion into a firm agreement of purchase and sale.

Respondents have made no request for rectification of the document, and no case has been made for rectification to their advantage or relief. The document is of their own drafting, and they have admitted no mistake. Respondents had had an earlier experience with appellant that may have given them some ground for doubting appellant's ability to finance the purchase of their property, and it is a fair conclusion, upon the evidence, that respondents desired an assurance that appellant really had money available, and for that reason required that he should put \$2,200 in their hands on the granting of the option. The evidence does not, in my opinion, go further than this. The written terms of the option must, therefore, govern, and it is there plainly and expressly set forth that the \$2,200 is paid as part of the \$11,000 at which appellant was given an option to purchase. Mr. Legris, from his long practice in a mining centre, must have been familiar with the form of option agreement common in mining transactions, under which a sum is paid by the optionee expressly as the price of the option, with the stipulation that if the option is exercised the amount so paid shall be applied in reduction of the purchase price of the property. There is nothing of the kind in this document, and it is impossible to give effect to it, as if there were.

Respondents alternatively rely upon the following clause in Ex. 1:—"In the event of this option not being exercised the amount paid by me shall be treated as liquidated damages and not as penalty."

Whatever else may be said in regard to this clause, it would seem to put an end, if anything more were needed, to the contention that the money paid by appellant was paid as the price of the option. It is to be treated as "liquidated damages". I find it difficult to place any interpretation upon this provision to which any effect can be given, if its words and phrases are understood in their ordinary or proper meaning. The event for which they are assumed to provide is the event of the option not being exercised, which fairly may be taken to mean not being exercised by deciding to purchase. That event would not, in any conceivable circumstances under this agreement, give rise to either penalty or liquidated damages. Appellant had an option that placed no obligation upon him. He was free to say that he would not buy, without having broken any contract or done any wrong for which he would incur either penalty or damages. If a forfeiture was intended, that should have been said expressly and in plain terms. The words of the clause are not capable of any such meaning.

An attempt was made by oral evidence to give the clause in question the effect of providing for forfeiture. Mr. Legris said that when appellant, in reading the document over before signing it, came to the clause now in question, he asked, "What does that mean?" and, receiving no answer, he continued, "I suppose it means if I don't come across I lose what I have paid?" To this the reply was, "You have got it correct, Mr. McCann, but take it or leave it; that is the way we will have it."

The respondent Conkey, who was present on this occasion, also gave evidence. His recollection of what was said regarding the clause in question is quite different from that of Mr. Legris. He says, "McCann when he read it [that is Ex. 1] asked you what that paragraph meant." The paragraph was identified and the examination continued. "Q. And what happened then? A. Mr. McCann said, after considering it, that he was glad it happened that way, that he would put his shoulder to see that the money was put up." Conkey could not remember any other remarks.

The two accounts are not corroborative, the one of the other, except of the fact that appellant asked what the clause meant.

Appellant was not questioned on the matter, and what he thought the clause meant in this confusing document, must, I think, remain an unsolved mystery.

It is to be noted that Ex. 1 does not expressly fix the duration of the option, nor provide in what manner appellant is to notify his election to take it up. The balance of the purchase price is required to be paid on or before noon of 29th August 1942, and, on payment, the purchaser is to be given possession and a clear title to the property covered by the option, "with all due dispatch", but it was no doubt open to appellant to give notice of taking up the option at any time after it was given him, without thereby expediting the date for payment of the balance of the purchase money. Whether appellant would, merely by giving notice of taking up the option, have been deemed to exercise it and so to avoid what respondents allege to be the consequences of not exercising the option, is a question that need not be answered, but the possibility serves further to illustrate the confusion arising from the extraordinary drafting of the option agreement.

It is not possible, I think, either by any interpretation of which the clause is capable, or by any justifiable rectification of it, even if rectification had been asked, to apply the clause to accomplish the forfeiture of the \$2,200 paid by appellant expressly on account of purchase price. Neither does the principle of such cases as *Howe v. Smith* (1884), 27 Ch. D. 89, and *Sprague v. Booth*, [1909] A.C. 576, C.R. [1909] A.C. 263, in which money was paid by way of deposit under a firm contract of purchase and sale, apply in this case of a mere option.

In my opinion appellant is entitled to recover the \$2,200 as money paid on a consideration that has wholly failed through no fault of his. There is much discussion of the principle on which such an action is supported in the recent case of *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Limited*, 167 L.T. 101, [1943] A.C. 32, [1942] 2 All E.R. 122, where money paid in advance on account of purchase price under a contract afterwards frustrated, was held to be recoverable. I refer particularly to the discussion by Lord Wright at pp. 110-111 (L.T.). I refer also to Williston on Contracts, rev. ed., s. 814, where it is said that "Failure of consideration then will exist wherever one who has either given or promised to give some performance fails without his fault to receive in some material

respect the agreed exchange for that performance." There was not frustration here, but, equally as in the case cited, the transaction came to an end without fault on the part of appellant. The \$2,200 paid was specifically on account of purchase price, and respondents retain the property on account of which it was paid. There is nothing in the agreement that entitles them to retain both the property and the money they received in part payment for it. Under these circumstances there is an implied obligation on respondents to return the money as money paid to them on a consideration that has wholly failed.

Upon another ground, quite distinct from what I have heretofore discussed, I think the judgment appealed from should not stand. There was more or less irregularity throughout the trial. Mr. Legris, who appears to have been interested in the transaction personally, as well as in the capacity of an officer of the hotel company, and who negotiated and drafted the option agreement, and is a defendant in the action, and a member of the firm of solicitors representing respondents in the action, was not only the chief witness for respondents at the trial, but was their counsel as well. It was not a proper position for him to place himself in, and it should not have been permitted, especially in a case where the accuracy of some of his statements was in issue. There was, however, an even more serious impropriety.

The evidence at the trial was closed on the afternoon of 24th November 1942, and at 5 p.m. the case was adjourned until the next morning for argument. After hearing argument on the morning of 25th November, the trial judge said that he had decided to dismiss the plaintiff's action with costs, and to dissolve the injunction and make an order vacating the caution. The formal judgment bears date the 25th of November. On appellant's application a stay of fifteen days was granted as to vacating the caution, and the trial judge said that he would deliver reasons for judgment that afternoon. Reasons for judgment were not delivered that afternoon, but the trial of another action on the list was proceeded with. On the afternoon of the following day, 26th November, at 4.20 p.m., Mr. Legris, counsel for respondents, being present, and no one being present in the interest of appellant, the trial judge addressed Mr. Legris as follows:—

"Mr. Legris, in reviewing my notes last evening I noticed that during your evidence you referred to resolutions passed

by the shareholders of the defendant company at a meeting held on the 31st January 1942, and also to a resolution passed by the directors of the defendant company at a meeting held on the 8th August 1942. These resolutions have not been filed as exhibits. I am sorry your opponent is not present and that we shall have to proceed without him."

Mr. Legris thereupon made formal application to file, and was permitted to file, two exhibits, described in the notes of evidence as follows:—

"Exhibit No. 11: Certified copy of abstract of minutes of meeting of shareholders of defendant company held on January 31, 1942, and abstract of minutes of meeting of directors of said company on said date."

"Exhibit No. 12: Abstract of minutes of meeting of directors of defendant company held on June 6 and August 8, 1942, duly certified."

No witness gave evidence as to the correctness of these "abstracts of minutes," and the only certificate they bear is that of Mr. Legris himself, as secretary.

The only item in either of these new exhibits that I have been able to identify as having been set forth in the evidence is what purports to be a resolution at a shareholders' meeting, held on 31st January 1942, which Mr. Legris substantially quoted in the course of his evidence in chief. On cross-examination he was asked to produce the minutes of that meeting, but he did not do so.

The above resolution is but a small part of what appears in Ex. 11. Included in it, besides a good deal more relating to that meeting of shareholders, is an "Abstract of Minutes" of a directors' meeting, also on 31st January 1942. It reads much like some one's summary of events, rather than a copy of the minutes of a meeting, and I can find nothing in any of the *viva voce* testimony that relates to it.

Ex. 12 begins with an "Abstract of Minutes" of a meeting of directors held on 6th June 1942. I find no reference to a meeting of that date in the *viva voce* testimony. There follows in the same exhibit what is styled "Complete Minutes of Meeting of Directors . . . held on the 8th day of August 1942." The heading as well as the form and substance of what follows, strongly suggests by contrast that the "Abstracts of Minutes" in both exhibits are in truth some one's summaries of the min-

utes, and the form of Mr. Legris' certificates upon them does not, in the least, conflict with this view.

Now, the authority of the respondents, Legris and Conkey, to bind the company in granting an option, was one of the issues at the trial. If what they had done did not bind the respondent company, there could be little question that appellant was entitled to have his money back. The evidence given by Mr. Legris in the witness-box was not, by any means, conclusive of the issue, and was objectionable in that he produced no minutes even when the minutes were asked for. It was highly improper after the case had been decided, and in the absence of counsel for appellant, who was not notified to be present, for Mr. Legris to put in as evidence the two exhibits to which I have referred. The trial judge no doubt thought counsel was filing only copies of resolutions, the terms of which had already been given in the oral evidence. In fact there was much more. Mr. Legris, on cross-examination, treated opposing counsel with scant respect, and did not always answer the questions he was asked, and it was not a case for extending him any liberties in the absence of opposing counsel. I do not attribute to Mr. Legris any conscious desire to take an unfair advantage, but he had a poor opinion of the case against him, and no doubt felt that he should finish it off.

The evidence does not, even with these added exhibits, clearly disclose authority in Messrs. Conkey and Legris to grant the option in question, and the supposed ratification at the directors' meeting of 8th August seems to have been conditional on submission to the shareholders, a thing that was never done. In my opinion a judgment cannot stand where evidence has been placed before the Court by the successful party in the improper manner that was pursued in this case. In the final result, for reasons I have already given, I am of the opinion that the appellant is entitled to succeed, but I should not, in any event, have thought it possible to overlook the admission of material evidence in the absence of one of the parties.

The appeal should be allowed, and appellant should have judgment for the recovery of \$2,200, with interest from 29th August 1942, with costs of action and of the appeal, including therein costs of the day when the appeal first came on for argument, but could not be heard until respondents were represented by other counsel.

GILLANDERS J.A.: This is an appeal from a judgment of Mr. Justice Plaxton dismissing with costs the plaintiff's action arising out of transactions looking to the purchase of a hotel property in the town of Haileybury. The respondent company was the owner of the property in question, and the personal respondents are the president and secretary-treasurer of the respondent company.

In July 1942, the appellant had certain negotiations and dealings with the individual respondents with a view to the purchase of the hotel in question.

On 4th August 1942, the appellant entered into a contract in writing with the respondent company through its president and its secretary-treasurer, the personal respondents. The exact form of this contract is of some importance, and it is desirable that it should be set out in full, as follows:—[see *supra*, p. 340].

The appellant was not represented by a solicitor in these negotiations or in completing the above contract, but after its execution he consulted a solicitor who made a search of title and advised the appellant that an undischarged mortgage for \$58,000 was registered against the property. The appellant's solicitor thereafter wrote to the respondent Legris, who was solicitor for himself and the other respondents, advising that the contract made between the parties had been registered as a caution in the proper Land Titles Office; drawing attention to the necessity for a discharge of the registered mortgage, and pointing out that some by-law or resolution of the company should be produced as to the power of the individual respondents to execute on behalf of the respondent corporation. He concluded his letter by stating that he had advised the appellant to withhold further payment until satisfied that title could be delivered. To this Mr. Legris replied by letter the next day, 27th August, pointing out that the situation had been fully explained to the appellant; that what the appellant had was only an option, not an agreement for sale; that a discharge of the mortgage in question was on hand and could be delivered, but not unless the appellant elected to exercise his option within the time limited and "should he fail to come across at that time the option will terminate."

The appellant in fact never paid or tendered the balance of the purchase money within the time specified.

There was considerable contest both at the trial and before this Court as to whether the document in question dated 4th August 1942, was in fact an agreement for sale and purchase or merely an option. The appellant contended throughout that it was a binding agreement to purchase; that time was not of the essence, and that he should be awarded specific performance on the terms of the agreement. The respondents contended that what the appellant had was merely an option; that all rights under it expired on 29th August, and that the \$2,200 paid by the appellant was not recoverable.

The document in question is, to say the least, unusual in form. It was drawn by the solicitor for the respondent company and at the time it was signed the appellant did not have a solicitor acting for him. If the ambiguity were sufficiently real to warrant resort to the principle, I would be inclined under the circumstances to construe the document most strongly against the grantor. Where an instrument by its terms was so ambiguous as to make it doubtful whether it was a bill or a note, the holder was entitled as against the maker to treat it as either at his election: *Lloyd v. Oliver* (1852), 18 Q.B. 471, 118 E.R. 178; and see *Neill et al. v. The Duke of Devonshire* (1882), 8 App. Cas. 135 at 149.

On consideration, I think that that rule, which is after all one of last resort, need not be applied, and that it should be held that the document is in fact an option and not an agreement for sale. Certainly if one seeks to resolve any ambiguity that may exist on this point by going beyond the written document to the evidence of the surrounding circumstances, as accepted and found by the trial judge, it is an option.

Having decided that the document is an option, however, I abstain from considering any parol evidence that might affect the construction of the document unless this becomes necessary. In construing the meaning of the language used, "no principle has ever been more universally or rigorously insisted upon than that written instruments, if they are plain and unambiguous, must be construed according to the plain and unambiguous language of the instrument itself." Per Lord Halsbury L.C., in *The North Eastern Railway Company v. Hastings*, [1900] A.C. 260 at 263.

It having been concluded that the document does not amount to a binding contract of sale, but in fact constitutes merely an

option which the appellant did not take up within the period provided, he must fail to obtain specific performance. The question then arising is whether or not the \$2,200 paid by him is recoverable. I proceed to consider this question on the merits, and at the moment apart from any question of pleading or proper constitution of the action in this respect.

It is important to see precisely in respect of what the sum of \$2,200 was paid. The document, in the form of a letter from the appellant to the respondent company, commences with an offer of \$11,000 for the property, and a request for an option on certain terms. The terms are then set out. Under these terms the \$2,200 is a payment on the purchase price. The document provides "The balance of \$8,800.00 to be paid cash on or before Saturday the 29th at 12 o'clock noon (August 1942)". Nowhere in the option is the payment of \$2,200 stated to be the purchase price of the option. Had it been clearly stated that the \$2,200 was the consideration for the option, even if there had been a provision that it might be applied on the purchase price in case the option was taken up, then the appellant might now have no right to its return. However, it is not necessary to determine that question. Nor is it necessary to consider what the position would be if the contract of 4th August between the parties had been a firm agreement for sale and purchase, which was later breached by the plaintiff. Other considerations would then arise.

In the leading case of *Howe v. Smith* (1884), 27 Ch. D. 89, there was a contract for sale and purchase and a sum had been paid "as a deposit, and in part payment of the purchase-money." It was held that the deposit, although taken as part payment after the contract was completed, was also a guarantee for the performance of the contract, and that the plaintiff, having failed to perform his contract within a reasonable time, had no right to return of the deposit. In that case Bowen L.J. says: "The question as to the right of the purchaser to the return of the deposit money must, in each case, be a question of the conditions of the contract." And later: "It is quite certain that the purchaser cannot insist on abandoning his contract and yet recover the deposit, because that would be to enable him to take advantage of his own wrong." Among many cases dealing with similar questions are *Brown v. Walsh* (1919), 45 O.L.R.

646; *Whitely v. Richards* (1920), 48 O.L.R. 537, 57 D.L.R. 728; *Douglas v. Arthur*, 53 O.L.R. 83, [1923] 3 D.L.R. 800.

As noted above, however, we are not here dealing with a contract for sale and purchase. The situation is comparable to that in *Chillingworth v. Esche*, [1924] 1 Ch. 97, where purchasers agreed to purchase certain lands "subject to a proper contract to be prepared by the vendor's solicitors" and paid a sum of money "as deposit and in part payment of the said purchase money." A proper contract was drawn by the vendors but never executed by the purchasers, who declined to proceed and claimed a return of the deposit. The Court of Appeal held that the agreement between the parties was only conditional, and did not constitute a firm contract, and that the purchasers were in the circumstances entitled to recover the deposit. Pollock M.R., says in part, at p. 107: ". . . I do not accept the view that the purchasers were paying the deposit as a guarantee or earnest of good faith that they would complete the purchase, because they could have revoked what had up to that time been agreed upon at any moment. It seems to me that when once the negotiations came to an end the rights of the parties were gone, and the purchasers were entitled to receive their money back." This is directly applicable to the situation here. See also *Casson v. Roberts* (1862), 31 Beav. 613, 54 E.R. 1277. There being no firm contract of purchase, the down payment should, in the absence of any other provision affecting its disposition, be recovered by the appellant, since the option was not taken up and the proposed purchase was not completed.

The only other provision of the document to be considered in this connection is the following: "In the event of this option not being exercised the amount paid by me shall be treated as liquidated damages and not as penalty." If the document under consideration had been a binding agreement of sale, which was breached by the appellant with damage to the respondent, then this provision for damages flowing from such breach might be of importance. The respondents have contended throughout that the document is not an agreement but an option, With that I agree. But the respondents cannot have the proposition both ways. It being an option, the appellant has breached no agreement. He had a right under the option either to accept it or to permit it to lapse and do nothing further. He was not bound to take up the option and was under no obligation to purchase

the property on the terms set out therein. The appellant not having been bound to exercise the option, no damages flow from his failure to do so, and the provision for liquidated damages is therefore of no effect.

In passing, it might be remarked that even if the document had been treated as an agreement it is doubtful if any damages could be shown to flow from a breach by the appellant, since the evidence indicates that the property has since been sold for \$15,000, an increase of some \$4,000 over the appellant's price. See the *obiter* remarks of Orde J. in *Douglas v. Arthur*, *supra*, at p. 85.

In view of the fact that my brother Laidlaw in his clear and careful judgment has concluded that the appellant is not entitled to a judgment here for a return of the moneys paid, because this relief is not claimed in the pleadings and, in effect, is not before the Court, I should briefly state my view on that point.

No objection seems to have been taken by the respondents on this ground at the trial, and the point was not taken by the respondents' counsel in this Court. The endorsement of the writ of summons claims, *inter alia*, "in the alternative to recover from the Defendants all monies paid to the Defendants". The statement of claim, to say the least, leaves much to be desired. The relevant facts are sufficiently stated to support a prayer for the return of moneys paid, but there is no specific prayer for this relief and no prayer for general or other relief. A perusal of the proceedings at the trial indicates that evidence was directed to the disposition of the moneys paid. The reasons of the learned trial judge indicate that the issues were clearly understood. At the beginning of his reasons he states as follows:

"The plaintiff's claim is, in substance, for specific performance of an option agreement for the purchase from the defendant company of the property in the town of Haileybury known as the Haileybury Hotel, subject to delivery by the defendants of a clear title to the said lands and on deposit in court by the plaintiff of the sum of \$8,800. In the alternative, the plaintiff seeks to recover from the defendants the sum of \$2,200 paid to them by the plaintiff in respect of the said option agreement, and damages for loss of business on account of the defendants being unable and unwilling to deliver title free from encumbrance to the said property.

"The defendants plead, in substance, that the action should be dismissed and the caution registered against the lands in question vacated with costs, on the ground that the option given to the plaintiff on 4th August 1942 had to be exercised on or before 12 o'clock noon on 29th August 1942; that upon exercise of the same the defendants were in a position to carry out the terms of the said option, but the plaintiff failed to comply with the terms thereof and did not at any time during the life of the said option make a tender of the balance owing in pursuance thereof.

"The defendant also makes a counterclaim against the plaintiff for damages for alleged loss of opportunities to sell the property in question caused to them by the plaintiff's said caution, which was not released at the expiration of the option on 29th August 1942."

The trial judge dealt with the point on its merits, no objection apparently having been made to the pleadings.

Return of the moneys paid is specifically claimed in the notice of appeal to this Court. In pursuance of Rule 495 the respondents lodged a statement of the points of law and fact intended to be argued. No question of pleading is raised. Paragraph 4 of this memorandum reads in part as follows:—

"4. As to the injunction application the plaintiff appellant in his writ, having made an alternate claim for the return of the sum of \$2,200 paid on the granting of option, has established the fact that this is not a matter for an injunction as anything to which he may be entitled is easily compensated by money." This is only quoted to show that the appellant's alternative claim for the return of moneys paid was clearly in mind and no objection was raised to the sufficiency of the pleadings on this point.

If the plaintiff had prayed for further and other relief I would have thought that that would have been sufficient: *Slater v. The Canada Central R.W. Co.* (1878), 25 Gr. 363, and *Phillips v. The Royal Niagara Hotel Co.* (1878), 25 Gr. 358.

In the circumstances here present, no objection having been taken by the respondents, I think that this issue, which was treated as properly before the Court both here and below, should be dealt with on its merits. In the case of *Howe v. Smith, supra*, the question as to the return of the deposit had not even been raised in the court below but leave was given to argue this question in the Court of Appeal and the Court "considered the neces-

sary amendments made." Although in the particular circumstances I do not think it necessary, and while it might be left open to the plaintiff to take such further action as he might be advised, I think it more in accordance with the provisions of s. 15(h) of The Judicature Act, R.S.O. 1937, c. 100, to provide that if the plaintiff considers it advisable he may even now have leave to amend his pleading by adding a prayer for the return of the moneys paid.

In the result the judgment appealed from should be set aside and judgment should be entered for the plaintiff against the defendants for the sum of \$2,200 with interest at 5 per cent. from 29th August 1942, with costs of the action and of the appeal, including costs of the day when the appeal first came on for argument.

LIDLAW J.A.:—The plaintiff appeals from a judgment of Plaxton J., dated the 25th November 1942.

The Temiskaming Hotel Company Limited operated a hotel and was the owner, subject to a mortgage, of the property on which the business was carried on. The defendant Conkey was president, and the defendant Legris was secretary and treasurer, and was also solicitor, of the company. The plaintiff carried on negotiations with the defendants Conkey and Legris with a view to the purchase of the premises from the company and the parties signed the following document: [see *supra*, pp. 340-341].

On the 24th August 1942, a caution was registered in the Land Titles Office at Haileybury, and it appears from the abstract of title that the plaintiff claimed to be interested in the land under an "option to purchase."

On 26th August 1942, a solicitor acting for the plaintiff communicated by letter (without prejudice) with Mr. Legris "regarding agreement entered into on August 4th last as to purchase of these premises". He stated that "The agreement before mentioned would be that a balance of \$8,000 (approximately) was to be made again Saturday next" and "I have advised Mr. McCann to withhold any further payment until such time as he is satisfied as to the condition of the title and he is certain that title can be delivered to him." There were two questions mentioned in the letter in respect to the title: (1) as to the mortgage on the property it is said "It appears to me that considerable difficulty would exist for your clients to give complete

title in securing a discharge of this mortgage"; (2) "It further appears to me that some by-law or resolution should be given or produced as to the power of you and Mr. Conkey to execute the agreement above referred to."

On the following day, 27th August, Mr. Legris replied to the solicitor for the plaintiff. He referred to "the making out of the option on the 4th instant", and said "what Mr. McCann has, as he well knows, is an option and not an agreement of sale as referred to in your letter." In reply to the questions relating to the title of the property Mr. Legris stated "Mr. McCann is also aware of the fact that we have on hand, available for this option, a discharge of the mortgage . . . and as far as completing title for a transfer to Mr. McCann is concerned, this is simply a matter of formality insofar as we are concerned but, of course, this cannot be done until such time as Mr. McCann elects to exercise his option not later than Saturday, the 29th, at 12.00 o'clock noon and should he fail to come across at that time the option will terminate." No answer appears to have been made to this letter from Mr. Legris to the plaintiff's solicitor. The plaintiff did not make any payment to the defendants on or before 29th August, as provided in the document signed by the parties, and has not made or tendered any such payment to the defendants since that date.

This action was commenced by writ of summons issued on the 10th October 1942, and the statement of claim, (bearing date of delivery "this 9th day of October 1942") sets forth the facts relied upon by the plaintiff and the relief asked for by him. It is alleged:

"2. The Plaintiff entered into with the defendants an agreement by which the plaintiff undertook to purchase from the defendant company a premises known as the Haileybury Hotel . . . for the sum of Eleven Thousand Dollars (\$11,000) on which the plaintiff paid on account the sum of Two Thousand Two Hundred Dollars (\$2,200) the balance of Eight Thousand Eight Hundred Dollars (\$8,800) to be paid at a time mentioned in the contract of purchase the defendants to provide clear title free from encumbrance at a reasonable period of time.

"3. The plaintiff previous to the time for making of the final payment of Eight Thousand eight hundred dollars (\$8,800) caused his solicitor to investigate the title of the above described lands and his report was that a mortgage existed against the

said lands for the sum of Fifty-eight Thousand Dollars (\$58,000) and that it would be desirable to have some proof that the defendants Conkey and Legris had authority from the Defendant company to enter into the agreement with him.

"4. The plaintiff caused a Caution to be lodged against the Parcels mentioned . . .

"5. The Plaintiff alleges that he is and has always been ready and willing to pay the balance of the purchase money for the said premises hereinbefore described and is still willing and anxious to complete the purchase of the said lands on the delivery to him of a clear title to the said lands.

"6. The Plaintiff . . . has sustained serious damage by reason of the defendants' delay in the misrepresentations made by the defendants Conkey and Legris and in that the Plaintiff has been unable to complete his purchase of the said hotel and the lands hereinbefore described and being unable to operate the said hotel as a business."

The relief asked for by the plaintiff in the statement of claim is as follows:

"7. The plaintiff therefore claims:

"(a) A judgment from this Honourable Court declaring that the plaintiff is entitled to the presentation of all necessary documents shewing that the defendants can produce a clear title to the lands above described on a deposit to the registrar of this Honourable Court of the sum of Eight thousand eight hundred dollars (\$8,800).

"(b) Proof to be supplied that the defendants Conkey and Legris had authority from the Defendant company to enter into the contract with the Plaintiff on behalf of the Defendant company.

"(c) Damages against the Defendant Conkey and Legris for failure of the production of the release of encumbrances and proof of their authority to enter into the above mentioned contract and assessment thereof.

"(d) The costs of this action."

The defendants filed and delivered a statement of defence and counterclaim dated the 21st October 1942. The allegations in the statement of claim are generally denied and the defendants say:

"3. . . . that at no time did they enter into an agreement with the Plaintiff . . . and the fact is that all the Defendants

did was to give the plaintiff an option . . . and the Plaintiff failed to exercise his option in pursuance of the terms therein contained.”

“4. The Plaintiff knew and was well aware of the fact that the option which he had signed on the 4th of August 1942 was for a limited specific time and that same had to be exercised on or before the 29th of August 1942 and that upon exercising of same the Defendants were in a position to carry out the terms of the said option but the plaintiff failed to comply with the terms thereof, nor did he at any time during the life of the said option make a tender of the balance owing in pursuance thereof.

“5. The defendants specifically deny paragraphs 5 and 6 of the plaintiff’s statement of claim and if he did suffer any damages it was by his own actions in not exercising his option in pursuance of the said option of the 4th of August 1942.”

The counterclaim made by the defendants against the plaintiff is “for damages for loss of opportunities caused to them by the Plaintiff’s caution which was not released at expiration of option on the 29th of August 1942 and also for loss of opportunity of being able to deal with the premises in question while same were encumbered by the Plaintiff’s Caution . . . including the loss of a couple of possible and probable sales which did not materialize due to the Plaintiff’s actions which have made it most difficult for the Defendant company to deal with its properties and assets.”

No reply to the statement of defence or defence to counterclaim appear to have been filed or delivered.

After trial, the action was dismissed, the counterclaim was dismissed, and an order was made vacating the caution and the certificate of the commencement of the action.

The plaintiff now contends that the learned judge was in error, and in his notice of appeal he sets out particulars of the judgment which he says ought to have been given, as follows:

“(a) That the Appellant was justified in not making the payment required to be made on the 29th August, 1942 . . .

“(b) That grave doubt existed as to the legality of the contract entered into on August 4th, 1942 in that no authority was given to the Defendants Conkey and Legris . . .

“(c) That in default of the Defendants providing discharge of the said Mortgage and then the Appellant have Judgment for the amount of monies paid by him to the Respondents together

with damages to be assessed . . . as against the Defendants Conkey and Legris.

“(d) That time is not of the essence of this contract.

“(e) That the amount mentioned in the contract is not in law liquidated damages but is a penalty . . . or in the alternative that in case it may be considered as damages then the Court should estimate the amount of actual damages.

“(f) That the Caution registered in the Land Titles Office should be directed to remain on record until the final disposition of the action and until the respondents carry out the terms of their contract according to law.”

I shall consider first the nature and particulars of the relief asked for by the plaintiff, and I shall then examine the evidence and law to determine whether such relief ought to be granted. It is abundantly clear that the material facts set forth in the statement of claim, and upon which the plaintiff relies, have for a basis the alleged existence of “an agreement by which the plaintiff undertook to purchase from the defendant company a premises known as the Haileybury Hotel”; see para. 2, *supra*. The plaintiff says explicitly that he “is still willing and anxious to complete the purchase of the said lands on the delivery to him of a clear title”; see para. 5, *supra*. He complains of damage “by reason of the defendants’ delay”, and “in that the Plaintiff has been unable to complete his purchase of the said hotel”: para. 6, *supra*. In effect the plaintiff says that by reason of the provisions of a contract made between him and the defendants he is entitled to the performance by the defendants of certain obligations. He pleads a willingness and readiness to do what is required on his part, but complains of continuing default on the part of the defendants. His cause of action rests solely on whatever obligation of the defendants may exist under the alleged agreement and he presents facts on which he says the Court should compel the defendants to satisfy their responsibilities. In substance the action as framed is for specific performance. In particular the plaintiff requires a judgment directing the defendants to produce all necessary documents to establish a clear title to the lands in question, and at the same time to show that the contract is valid.

Do the facts as established by evidence entitle the plaintiff to such a judgment? I am satisfied that they do not. The document upon which the plaintiff bases his claim is incongruous. It is generally vague, conflicting in parts, and the nature of it is

uncertain. But one paragraph at least is clearly expressed and admits of no doubt in my view. The plaintiff could not reasonably misunderstand the meaning of the language subscribed to by him as follows, "I am to be given a clear title free from encumbrance of all assets of the company with all due dispatch after payment being made as above mentioned". He was not to be given a clear title before payment by him as provided in the document. And the word "payment" does not mean part payment. It means, I think, full payment of all sums mentioned previously in the document. Payment by the plaintiff of all such sums was a condition precedent to his right to have a clear title established and given to him by the defendants. That condition has not been fulfilled, and the plaintiff's cause of action is consequently incomplete. Apart, however, from the result in law of the failure of the plaintiff to fulfil the condition discussed, evidence accepted by the learned trial judge shows: (1) that the defendants had obtained a discharge of the mortgage before 29th August; and (2) that the plaintiff was given full opportunity to examine the discharge. Mr. Legris testified that on the 19th or 20th August the plaintiff and Mr. Conkey were in his office. He further testified that "On this occasion this document was on my desk only a few inches away from where McCann was sitting, and I said: 'The discharge of mortgage has arrived McCann', and I turned it over to him and said: 'If you care to look at it, there it is, signed by everybody.'" McCann replied, "That is all right. If you tell me it is discharged I am satisfied it is." The trial judge, referring to Mr. Legris says: "He has given a detailed, and I believe a candid, faithful, and factual narrative of his dealings with the plaintiff McCann," and he has "no hesitation in accepting the evidence of Mr. Legris, confirmed as it is by that of Mr. Conkey, who is a very respectable citizen of the community, as to the mortgage of \$58,000 and the discharge of it which had been obtained." The defendants were not bound to clear the title of the property and free it from encumbrances, or to produce any evidence of their ability to do so, before 29th August: *Brickles v. Snell*, [1916] 2 A.C. 599, 30 D.L.R. 31, [1917] 1 W.W.R. 1059.

The plaintiff claims "proof to be supplied that the defendants Conkey and Legris had authority from the Defendant company to enter into the contract with the Plaintiff on behalf of the Defendant company." But the plaintiff has no right in law to such proof. He rests his case on the existence of an enforceable

contract. He asks, in effect, that it be specifically performed by the defendants. He cannot at the same time attack or question the validity of the document. He was an outsider dealing with officers of a limited company. He was not obliged to go into internal matters or to see that particular formalities were complied with, but on the contrary he was entitled to assume that the defendants Conkey and Legris had all proper authority to enter into the transaction: *The Royal British Bank v. Turquand* (1856), 6 El. & Bl. 327, 119 E.R. 886; *Mahony v. East Holyford Mining Company (Limited)* (1875), L.R. 7 H.L. 869; *Herrmann v. Canadian Nickel Co. Ltd.*, 64 O.L.R. 190, [1929] 4 D.L.R. 42.

It follows from what I have said that the plaintiff's claim for damages against the defendants Conkey and Legris "for failure of the production of the release of encumbrances and proof of their authority to enter into the above mentioned contract" must fail, and that he is not entitled to any relief as asked for in the statement of claim as framed.

It was argued, however, that the Court should make an order that the defendants repay to the plaintiff the sum of \$2,200 mentioned in the document signed by the parties on 4th August 1942. The learned trial judge was apparently invited by counsel to consider and determine whether this sum was a penalty or liquidated damages. Accordingly, he decided that the amount was "a genuine covenanted pre-estimate of the damages which the parties agreed would be treated as flowing from the plaintiff's default—if default he should make, as he did—in carrying out the terms of the option." In the notice of appeal prepared and served on behalf of the plaintiff, it is said in part that the learned trial judge was in error and should have decided "That in default of the Defendants providing discharge of the said Mortgage and then the Appellant have Judgment for the amount of monies paid by him to the Respondents, together with damages to be assessed . . . as against the Defendants Conkey and Legris." Notwithstanding such argument before the trial judge and before this Court, it is necessary to determine whether this claim is properly before the Court for adjudication. If it is not, it should not now be the subject of a judgment. Rules of Practice have been made so that issues may be raised by pleadings and brought clearly before the Court for decision. No just claim should be defeated or avoided by reason of any technicality, and, subject to protection of all interested parties, wide power of amendment

should be exercised to enable all matters in dispute to be settled without multiplicity of litigation. But the Rules cannot be ignored, and the Court cannot be expected to decide issues which are not properly brought before it either in the original pleadings or in any amendment of them. Likewise the Court does not grant relief which has not been asked for either expressly or generally, and in my opinion it would be improper so to do. I have quoted extensively from the pleadings in this action, and I now examine the Rules applicable to them on the question under consideration.

Rule 109 provides: "The plaintiff shall state the nature of his claim and the relief sought in a pleading to be called the Statement of Claim and may therein alter, modify, or extend his claim as indorsed upon the writ."

Rule 145 provides: "Every statement of claim and counter-claim shall state specifically the relief claimed, either simply or in the alternative, and may also ask for general relief. When damages are claimed the amount shall be named."

It is to be noted that the plaintiff may "alter, modify, or extend his claim as indorsed upon the writ." In this case the endorsement on the writ reads as follows:

"The Plaintiff's claim is for a Judgment from this Honourable Court granting to the Plaintiff the right to complete the purchase from the Temiskaming Hotel Co. Ltd. by payment of the balance of the purchase price as set out in Caution registered No. 77191 against Parcels 1777, 3184 and 4980 Nipissing North Division on delivery of a clear title to the said lands, or in the alternative to recover from the Defendants all monies paid to the Defendants and for damages for loss of business on account of the Defendants being unable and unwilling to deliver title free from incumbrances of the said premises, the defendants Legris and Conkey, never having been properly authorized to enter into an option with the Plaintiff as set out in the Caution above referred to."

But the statement of claim does not mention the claim endorsed on the writ, *viz.*, "in the alternative to recover from the Defendants all monies paid to the Defendants." It has been held "that a plaintiff must be treated as having abandoned a claim which is endorsed on the writ but is not mentioned in the statement of claim." *Cargill v. Bower* (1878), 10 Ch. D. 502; *Lewis and Lewis v. Durnford* (1907), 24 T.L.R. 64.

In accordance with Rule 145, the statement of claim states specifically the relief claimed. But there is no alternative relief

claimed and the plaintiff does not ask for general relief. Moreover, no application has been made on behalf of the plaintiff to amend the statement of claim in any way, notwithstanding that the attention of counsel for the plaintiff was expressly directed during argument to the limited prayer for relief. Even if a general prayer for further relief were included in the statement of claim it is my opinion that judgment for return of the money received by the defendant should be refused, because the abandoned claim is inconsistent with the relief specifically asked for in the statement of claim. "You cannot, under a general prayer for further relief, obtain a relief inconsistent with that relief which is expressly asked for", per Fry L.J. in *Cargill v. Bower*, *supra*, at p. 508; see also *Gaughan v. Sharpe et al.* (1881), 6 O.A.R. 417 at 426. Moreover, if general relief is not asked for, it will be considered that the party does not want it: per Jessel M.R. in *Holloway v. York* (1877), 25 W.R. 627 at 628.

Finally, it has been held that in an action claiming specific performance and general relief, judgment for the return of a deposit should be refused: *Holloway v. York*, *supra*. In *Brickles v. Snell*, *supra*, the plaintiff claimed specific performance of a contract. On appeal it was argued that in any event the plaintiff was entitled to a return of the money which he had paid. Lord Atkinson, at p. 604, said:

"It is . . . very unfortunate that a claim in the alternative was not inserted for a return of the deposit of 500 dollars, or that, if not originally claimed, liberty should not have been asked to amend the pleading by inserting such a claim, so that there might have been a complete adjudication on all matters in dispute between the parties, and all further litigation have been prevented. That, however, has not been done, and their Lordships therefore can only deal with the issues raised by the pleadings as they stand."

This view should prevail, and for the reasons given I would dismiss the appeal with costs.

Appeal allowed with costs and judgment directed for the plaintiff with costs; LAIDLAW J.A. dissenting.

Solicitor for the plaintiff, appellant: George Mitchell, Kirkland Lake.

Solicitors for the defendants, respondents: Legris & Legris, Haileybury.

[COURT OF APPEAL.]

Re Wooddisse.

Wills—Legacies—Certainty—Direction to See that Beneficiary “not in want”—Validity.

A testator, after providing a bequest for G., declared in the same clause of his will that it was “my will that my Executors herein named shall hold enough money in reserve to see that G. is not in want during her lifetime.” After providing for two other legacies, he provided by clause 6, that “the balance of my estate after the former bequests are satisfied, is to go to W.” Clause 7 provided: “should my heirs consider it advisable to convert my Real Estate into cash for better investment, my Executors herein named have full authority to make Deeds of same to purchaser.”

Held, (1) The provision for a “reserve” for G.’s benefit was not void for uncertainty. The duty of the executors under this provision was to retain enough of the estate to ensure that, to the extent that assets remained in the estate, G. should not be reduced to the level of bare subsistence. In the circumstances of this case, this meant that G. was entitled to resort to the estate from time to time to the extent to which other available means might fall short of enabling her to live on a scale appropriate to her station in life. If the whole residue should be required for that purpose, it must be so applied, and this possibility would entail the retention of the entire residue in the executors’ hands in the meantime. W.’s interest in the residue was subject to the trust for G.

(2) The right of the executors to dispose of the assets of the estate was not subject to W.’s consent, notwithstanding that, under clause 6, he took the corpus as well as the income of the residue. The provisions of clause 7, since they related to conversion “for better investment”, did not stand in the way of such a conversion of the assets as the executors might find necessary to carry out the provisions of the will.

AN appeal by Edith May Gregory from the judgment of Barlow J. on a motion for the construction of the will of Joseph James Wooddisse, deceased.

The will is set out in full in the judgment of RIDDELL J.A. Barlow J.’s answers to the questions sufficiently appear in the judgments now reported.

14th April 1943. The appeal was heard by RIDDELL, GILLANDERS and KELLOCK JJ.A.

J. D. Wilson, for the appellant: Although the amount to be set aside is not stipulated in the will, it is within the power of the Court to ascertain and fix it: *Kilvington v. Gray* (1839), 10 Sim. 293, 59 E.R. 627. In *Thorp v. Owen* (1843), 2 Hare 607, 67 E.R. 250, the Court upheld a devise made for the purpose of enabling a widow to support herself and her children according to her discretion, and in *Broad v. Bevan* (1823), 1 Russ. 511n, 38 E.R. 198, the Court held that uncertainty of the amount was no bar to enforcement. Since it was the clear intention of the testator that this appellant was to be provided

for, then unquestionably she is entitled to such provision by the estate: *Batt v. Anns* (1841), 11 L.J. Ch. 52. A provision such as the one now in dispute cannot be lightly dismissed. It is a very serious matter to the beneficiary, and the wording in this will is commonly used when the corpus is left for the maintenance and support of a widow.

The issue seems to be whether, if, as contended on behalf of the appellant, a trust was created, that trust was an express or a discretionary one. The nature of a trust is discussed in *Jarman on Wills*, 7th ed., vol 1, pp. 429, 432. In the case at bar, it is submitted there is an express trust created rather than a mere power given to the executors, which distinguishes it from *Gisborne et al. v. Gisborne et al.* (1877), 2 App. Cas. 300; and that the facts in *In re Sanderson's Trust* (1857), 3 K. & J. 497, 69 E.R. 1206, are more applicable. [RIDDELL J.A.: Express trusts must be paid first and then the residue must be applied to other bequests.] It seems clear on the authorities that an express trust is created by the last sentence of clause 1 in favour of the appellant.

J. R. Howitt, K.C., for unserved next of kin: By virtue of the terms of the will, the executors must hold all the assets of the estate in reserve for the appellant. The paramount wish of the testator was that she should be kept from want, and therefore all other claims are subsequent to hers. Consequent to this, any assets so reserved and not so used, and after satisfaction then of the bequests to the church and the cemetery, will be undisposed of under the will and will become the residue passing to the next of kin of the deceased as on an intestacy. If it should be found that the respondent Kenneth Worcester has an interest in the residue of the estate, that interest must be limited to the income thereof only during his lifetime, and the capital thereof passes on his death to the next of kin. The respondent did not have a whole interest in the estate, which distinguishes the case from that of *Re Jones*, 60 O.L.R. 136, [1927] 2 D.L.R. 113; and under the present circumstances, the capital should not be touched for the purposes of the respondent Kenneth Worcester.

C. C. Calvin, K.C., for respondent Kenneth Worcester: This will was drawn on a printed form, and it is necessary for the Court to construe strictly the meaning of the words employed by the testator: 34 Halsbury, 2nd ed., p. 139. The words con-

tained in the last sentence of clause 1 are void for uncertainty, because it is impossible to ascertain the amount of the gift. The words are insufficient to identify the subject matter and its quantity: *Asten v. Asten*, [1894] 3 Ch. 260 at 263-4. It is impossible for the Court to make a new will and use a yardstick of its own to determine the amount. [RIDDELL J.A.: If the executors decided that a certain sum was adequate and the appellant disagreed, could the Court determine the dispute?] If the Court did that, it would in effect be making a new will. There is nothing in the will to furnish a basis as to the amount intended to be bequeathed or set aside: *Jones d. Henry v. Hancock, et al.*; *Long d. Henry v. Hancock, et al.* (1816), 4 Dow 145, 3 E.R. 1119. There are many authorities that could be cited to support the proposition that devises are rendered void for uncertainty when the intended subject matter of the disposition cannot be ascertained: 33 Halsbury, 2nd ed., p. 100; 34 Halsbury, 2nd ed., p. 220; *Jubber v. Jubber* (1839), 9 Sim. 503, 59 E.R. 452; *Peck v. Halsey* (1726), 2 P. Wms. 387, 24 E.R. 780; *White et al. v. White et al.* (1908), 28 N.Z.L.R. 129. [KELLOCK J.A.: In those cases the difficulty was that there was no method of measuring the gift. Here, the criterion established is the need of the appellant.] It would be very difficult to make certain the meaning of the words "in want". Who is to say what constitutes want? [GILLANDERS J.A.: The executors could use their judgment in determining the amount of money required to keep the appellant from being in want.] It is submitted on behalf of the appellant that the whole residue of the estate should be set aside for that purpose, which on the face of the will is contrary to the intention of the testator. A further reason for considering this provision void for uncertainty is that it is not certain when and how it will take effect, the words "in want" not having been defined: Jarman on Wills, 7th ed., p. 429; *Buckley v. Buckley* (1887), 19 L.R. Ir. 544; *In re Moore*; *Moore v. Roche* (1886), 55 L.J. Ch. 418. The language is admittedly difficult, but nevertheless its meaning is to be found within the four corners of the document.

Even if the appellant could maintain the position that the last sentence of clause 1 is not void for uncertainty, it must refer to the gift of \$1,000 contained in the earlier portion of clause 1. The word "money" appears nowhere else in the will, and its use immediately follows upon the only monetary gift

to the appellant. It would be inconsistent to provide a further specific gift to her, namely a chattel mortgage, if the sentence carried the meaning submitted by the appellant. In clause 7 of the will the word "heirs" must surely mean, as the learned judge has found, the person or persons interested in the residue, that is to say, the respondent Kenneth Worcester. Where no other disposition of the capital has been made, an unlimited gift of the income of property to a person is a gift of the capital or corpus: *Re Macdonald*, [1931] O.R. 659 at 670, [1931] 4 D.L.R. 920.

L. W. Goetz, K.C., for the executors: The executors have renounced all beneficial interest to them and each of them, under clause 7 of the will. The gift to the appellant is not too indefinite. It has the definite object of keeping the appellant from being "hard up", which is a colloquial way of saying that she shall be supplied with the necessities suitable to her station in life. The words in the disputed sentence: "the executors are to see" means "in their discretion", and the word "heirs" used later in the will must mean those who benefit from the estate. An unlimited gift of income passes the corpus, so if the corpus is to be kept intact in accordance with the testator's express wish, surely the respondent Worcester is limited to income.

T. H. Simpson, K.C., for St. James' Anglican Church: It is the contention of this respondent that the testator intended the money bequeathed to the church to be paid to it directly. The concluding words of clause 1 are simply a direction to the executors to hold enough money in reserve. The gift to the church is specific in amount, in the source from which it is to be paid, and in the rate of interest. This amount was charged against the farm, and should be paid when the property is sold. It was the intention of the testator that interest should be paid to the church.

J. D. Wilson, in reply: There should be no difficulty in determining when the appellant is in want. It is in the discretion of the executors to ascertain that point, using as a basis of calculation, whether or not she lacked the necessities of life: *Re Hamilton* (1908), 12 O.W.R. 1177. The cases cited on behalf of the respondent do not deal with support or maintenance at all, except *Re Pringle* (1911), 20 O.W.R. 403, 3 O.W.N. 231.

The will is an illogical document, but so far as possible effect should be given to its language. [GILLANDERS J.A.: What is your position with reference to the two legacies?] The appellant will not press the point that the legacies should not be paid.

Cur. adv. vult.

11th May 1943. RIDDELL J.A. (*dissenting*):—Joseph James Wooddisse, an unmarried man, died some four years ago, having made a will, apparently drawn up by himself on one of the blank forms for sale everywhere. It reads as follows:

“THIS IS THE LAST WILL AND TESTAMENT of me JOSEPH JAMES WOODDISSE of the Township of Maryborough in the County of Wellington and Province of Ontario, made this Twentieth day of February in the year of our Lord one thousand nine hundred and thirty-seven.

“I REVOKE all former Wills or other Testamentary Dispositions by me at any time heretofore made, and declare this only to be and contain my last Will and Testament.

“I DIRECT all my just debts, Funeral and Testamentary expenses to be paid and satisfied by my Executors hereinafter named as soon as conveniently may be after my decease.

“I GIVE DEVISE AND BEQUEATH all my real and personal Estate of which I may die possessed in the manner following, that is to say

“1. I give devise and bequeath to Edith May Gregory, all my household effects, clothing, furniture, and all live stock, implements, Automobile, grain and hay, and also my house and lot being number 220 in the Village of Drayton, and one thousand dollars cash, AND it is my will that my Executors herein named shall hold enough money in reserve to see that Edith May Gregory is not in want during her lifetime.

“2. I direct that a Chattel Mortgage held by me against William C. Gregory be assigned to Edith May Gregory.

“3. To St. James Anglican Church, Rothsay, the sum of one thousand dollars, to be paid five years after my decease or to remain in the farm at five per cent. interest, the interest to be paid on said amount from my decease.

“4. To the management of Derryadd Cemetery Rothsay, the sum of two hundred dollars to be invested and the interest used to keep the Family plot and monument in good condition.

Said amount may remain in farm for five years at five per cent. interest.

"5. THE first bequest is made on the condition that Edith May Gregory stays with me and cares for me during my lifetime.

"6. THE interest from the balance of my estate after the former bequests are satisfied, is to go to cousin, Kenneth Worcester, to be held in trust for him by his Father if he is not of age. It is my Will that said portion of my estate be kept intact and only the interest used.

"7. AND should my heirs consider it advisable to convert my Real Estate into cash for better investment, my Executors herein named have full authority to make Deeds of same to purchaser.

"ALL the residue of my Estate not hereinbefore disposed of I give devise and bequeath unto.

"AND I nominate and appoint Russell P. Brandon, of the Village of Drayton, and James Grieves, of the Township of Maryborough to be executors of this my last Will and Testament.

"IN WITNESS WHEREOF I have hereunto set my hand the day and year first above written.

"SIGNED, PUBLISHED AND
DECLARED BY THE SAID
JOSEPH J. WOODDISSE,
the Testator as and for his
last Will and Testament in the
presence of us who both present
together at the same time
in his presence at his request
and in the presence of each
other have hereunto subscribed
our names as witnesses.

"J. J. Wooddisse"

"A. B. McColgan

"Frank Brandon."

The beneficiary, Edith May Gregory is a married woman, taken as a babe into the home of the testator's family and brought up, practically as a child of that home. The executors not understanding their full duty as to the provision to retaining

money to preserve her from want, applied to the Court for advice; and Mr. Justice Barlow decided that this provision was void from uncertainty—she now appeals.

Of course, the Court has the deepest sympathy for the appellant, but we are bound to find not what the testator desired, but the meaning of the words he employed in stating his desire.

Here, the executors were directed to hold so much money as was necessary to preserve her from want. I do not decide what precisely must be provided against; perhaps it was that she should have such necessities, clothing, food, lodging, etc., as she had been accustomed to, or as were suitable for a person in her station of life—it, in any event, called for the expenditure—the necessary expenditure—of money. It is obvious that the amount of money needed for any such purpose must, except in very special cases, be unknown—she might earn money, as many women are now, and need less—she might fall sick and need more, many exigencies might arise all calling for a different supply of money. No one could say how much money must be kept to meet a rightful demand.

With great reluctance, I find myself compelled to find that this provision is not certain, and therefore is invalid.

That a provision in a will is invalid if uncertain is text-book law and requires no authority to be quoted; Theobald on Wills, 9th ed., pp. 638-640; or Jarman on Wills, 7th ed., pp. 428, *sqq.* may be looked at.

I would dismiss the appeal, costs of all parties (including those whom we allowed to address the Court though not notified of the appeal) to be paid out of the estate, the costs of executors as between solicitor and client.

GILLANDERS J.A. agrees with KELLOCK J.A.

KELLOCK J.A.:—This is an appeal from the judgment of Barlow J., pronounced 11th March 1943, upon an application by way of originating motion, made on behalf of the executors of the late Joseph James Wooddisse, deceased, for the opinion, advice and direction of the Court as to the true interpretation of the last will and testament of the deceased, and upon certain questions arising in the administration of his estate.

By his will the testator, after directing payment of debts and funeral and testamentary expenses by his executors, provided as follows [see *supra*, p. 369].

Barlow J. has held that the following words in clause 1 of the will, namely:—"And it is my will that my executors herein named shall hold enough money in reserve to see that Edith May Gregory is not in want during her lifetime", are void for uncertainty, and that the executors have power to convert into cash the whole or any part of the real estate of the deceased not specifically devised, but require the consent of Kenneth Worcester therefor. The appellant, Edith May Gregory, appeals both findings. The appellant also contends that the learned judge ought to have answered questions 2 and 3 in the originating notice of motion, and to have held that the executors should hold in reserve the entire residue of the estate after payment of the specific and pecuniary bequests to Edith May Gregory, and that they have no discretion as to the sum of money which should be held in reserve. The appeal is supported by Mr. Howitt on behalf of the next of kin.

The proposition on behalf of the respondent Worcester in support of the judgment appealed from amounts to this, that under a will in which a testator, possessed of ample estate, directs his executors to hold sufficient of his estate to ensure that his widow shall not during her lifetime be in want, with a gift of residue to a third person, the widow takes nothing. I cannot think such a proposition is well founded.

The principle applicable, in my opinion, is to be found in the judgment of Sir George Jessel M.R. in *In re Roberts; Repington v. Roberts-Gawen* (1881), 19 Ch. D. 520 at 529, as follows:—"But the modern doctrine is not to hold a will void for uncertainty unless it is utterly impossible to put a meaning upon it. The duty of the Court is to put a fair meaning on the terms used, and not, as was said in one case, to repose on the easy pillow of saying that the whole is void for uncertainty."

No objection can arise on the ground of uncertainty, where, although the amount of the gift is not defined, it is stated to be for a particular purpose, and the Court can, by inquiry, ascertain what is the sum sufficient or necessary to answer that purpose: 34 Halsbury, 2nd ed., p. 221.

In *Kilvington v. Gray* (1839), 10 Sim. 293, 59 E.R. 627, the testator made certain provision for an infant until the age of

sixteen, and then proceeded as follows: "I then leave him to the care of my trustees to provide for him in some business or profession, and his future maintenance out of my funded property." It was held that this language constituted a valid trust for the benefit of the infant, and it was referred to the Master to determine the proper amount necessary to place the infant in a business or profession, and the proper amount to be allowed to the infant for maintenance for his life.

In *Broad v. Bevan* (1823), reported in a note in 1 Russ. 511, 38 E.R. 198, the testator, after various bequests, proceeded as follows:—"I give and bequeath unto my daughter Ann, now living with me, the sum of £5 a year for her life, payable half-yearly by my executor. I also order and direct my son Joseph to take care of and provide for my said daughter Ann during her life. I give to the daughter of my said daughter Ann the sum of £100, to be paid to my said grand-daughter on the death of her said mother", and "subject as aforesaid," the testator devised and bequeathed unto his son, Joseph, all his real and personal estate. It was held by the Master of the Rolls, Sir Thomas Plumer, that the daughter, Ann, was entitled to have a provision made for her out of the residue, in addition to her annuity, and it was referred to the Master to determine the proper amount to be allowed for her maintenance and support. A similar result was arrived at in *Batt v. Anns* (1841), 11 L.J. Ch. 52, where the will provided, "I also leave the said Thomas Batt under the protection of the said Ann Parham, to be by her apprenticed and taken care of, and to be provided for to the best of her judgment, as long as the said Ann Parham remains unmarried."

To my mind the language of the will in the case at bar is equally certain with the language employed in the cases just referred to. Such cases, of course, are only of value in so far as they illustrate a principle. The Court has no difficulty in ascertaining in any given case the proper amount required for maintenance, and the Court equally has no difficulty in determining in any given case what are "necessaries" in the case of husband and wife, or infants.

Under the terms of the will in question the duty of the executors is to see that Mrs. Gregory is not in want during her lifetime. She is not to be reduced to bare subsistence, nor is she to be left to lead a "hand to mouth" existence. That which

she has been given by the testator in the early part of para. 1 is a house in the village of Drayton, valued at \$1300, and approximately an additional \$1300, including the \$1000 cash. She is 65 years of age and her husband is 69. Since 1927 they resided with the testator under an arrangement by which Mrs. Gregory looked after the house while her husband carried on the work on the testator's farm. These facts constitute the background and indicate the measure of the duty imposed by the language used by the testator in the last sentence of para 1. Should Mrs. Gregory apply to the executors from time to time in the future for assistance they would have no difficulty in ascertaining the amounts necessary to keep her from being reduced to the level of bare subsistence. If the executors declined to carry out their duty with respect to this trust, the Court in my opinion would execute the trust. My view is that the duty of the executors, after carrying out the provisions of the first sentence of para. 1 and paras. 3 and 4, is to retain sufficient of the estate to ensure that, to the extent there are remaining assets in the estate, Mrs. Gregory shall not be reduced to the level of bare subsistence. In the circumstances of this case, I think that this means that Mrs. Gregory is entitled from time to time to have resort to the estate to the extent to which other means available to her may fall short of enabling her to live on a scale appropriate to her station in life. If the whole residue should in the result prove to be required for that purpose, it must be so applied. This would entail the retention of the residue in the hands of the executors in the meantime. The interest of Worcester in the residue is subject to that of the trust for Mrs. Gregory. I refer to *Rudland v. Crozier* (1858), 2 DeG. & J. 143, 44 E.R. 942; *In re Sanderson's Trusts* (1857), 3 K. & J. 497, 69 E.R. 1206.

It was somewhat faintly argued by Mr. Wilson that the trust for the benefit of Mrs. Gregory should take precedence over the provisions made by paras. 3 and 4, but my view is as stated. It should be said that it is agreed by all parties that Mrs. Gregory has satisfied the condition mentioned in para. 5 of the will.

Reference may also be made to *Re Evans* (1902), 3 O.L.R. 401, where the testator bequeathed to each of two named sons a definite sum of money. He directed his executors to invest the same during the lifetime of the sons, or the survivor, and to

pay to each of them one-half of the income, and proceeded: "And in case of sickness of my said sons, or either of them, I desire my said executors to advance such portion as they may think necessary of the principal money to support my said sons, or such of them as may be sick," and there was a gift over upon the death of each son. The executors had paid income, as directed, and upon the death of one son it appeared that although the executors had no notice of it, he had been sick. It was held that there had been no absolute gift of the corpus to the son, but that a trust was created, to be exercised by the executors in case of sickness, and that they had no discretion to decline to exercise it. If the executors were not disposed to perform the trust, the Court would undertake it even after the son's death.

Mr. Calvin referred us to a number of authorities, including *Asten v. Asten*, [1894] 3 Ch. 260; *Jones d. Henry v. Hancock, et al.*; *Long d. Henry v. Hancock, et al.* (1816), 4 Dow 145, 3 E.R. 1119; *Jubber v. Jubber* (1839), 9 Sim. 503, 59 E.R. 452; *Peck v. Halsey* (1726), 2 P. Wms. 387, 24 E.R. 780; *White et al. v. White et al.* (1908), 28 N.Z.L.R. 129; *Buckley v. Buckley* (1887), 19 L.R. Ir. 544; *In re Moore*; *Moore v. Roche* (1886), 55 L.J. Ch. 418. I do not think it necessary to deal with each one of these cases individually. Each depends upon the particular language there employed, and each, in my opinion, is distinguishable from the case at bar.

It was further argued by Mr. Calvin that in the event the Court were of opinion that the language referred to was not too uncertain to constitute a valid trust, the fund which the executors were to use for the purposes of the trust was the sum of \$1,000 referred to in para. 1 of the will. I do not think that this is the fair meaning of the language employed by the testator. The gift of \$1,000 to Mrs. Gregory was of cash, and there is nothing in the following words sufficient, in my view, to effect the result that the beneficiary is not to receive this sum in cash. I think the provision made by the testator in the last sentence of para. 1 is in addition to the earlier benefits provided by the paragraph for Mrs. Gregory.

The learned judge has determined that under the provisions of para. 6 Kenneth Worcester takes the corpus, and there is no appeal from this decision. His interest in the estate under the provisions of this paragraph is, however, subject to the provisions of the earlier paragraphs, I do not think the provisions

of para. 7 stand in the way of such conversion of the assets as the executors may find necessary in order to carry out the provisions of paras. 1 to 4 inclusive. The conversion referred to in para. 7 is a conversion for "better investment" and does not refer, in my mind, to such conversion as may be necessary for the purpose of carrying out the provisions of the earlier paragraphs, including setting up the trust provided for by para. 1. I do not think, therefore, that the consent of Kenneth Worcester or any other beneficiary is necessary in order to enable the executors to convert for the purpose of carrying out their duties under paras. 1 to 4.

I would therefore allow the appeal in the respects indicated. In accordance with the usual rule where the difficulty has been created by the testator himself, the costs of all parties should be out of the estate, those of the executors as between solicitor and client.

Appeal allowed, RIDDELL J.A. dissenting.

Solicitors for Edith May Gregory, appellant: Wilson & Wilson, Fergus.

Solicitors for Kenneth Worcester, respondent: Fasken, Robertson, Aitchison, Pickup & Calvin, Toronto.

Solicitors for St. James' Anglican Church: Lee & Simpson, Hamilton.

Solicitors for other next of kin: Howitt & Howitt, Guelph.

Solicitors for the executors: Dunbar, Goetz & Dunbar, Guelph.

[COURT OF APPEAL.]

The Prudential Insurance Company of America v. McLean.

Landlord and Tenant—Forfeiture and Re-entry for Non-payment of Rent—Conditions of Exercise of Right—Waiver—Acceptance of Rent after Forfeiture—The Landlord and Tenant Act, R.S.O. 1937, c. 219, s. 17(1).

The right of a landlord where rent remains unpaid for fifteen days after it is due, under s. 17 of The Landlord and Tenant Act, is a right to re-enter, which can be exercised only by an actual re-entry, by the issue of a writ, or by the taking of proceedings under the Act to recover possession. Notice need not be given of the intention to re-enter, and if notice is given it is not effective of itself to put an end to the lease where re-entry is prescribed. *Moore v. Ullcoats Mining Company, Limited*, [1908] 1 Ch. 575 at 588, applied. If the landlord does in fact re-enter, or do one of the other equivalent acts, his determination to exercise the right of forfeiture is irrevocable.

Rent due on 1st January being unpaid, the landlord wrote to the tenant stating that the lease was forfeited because of the non-payment, and demanding possession by 28th February. A distress had been made for the January rent on 15th January, and on 16th February the landlord, through its bailiff, accepted payment of the January and February rent. Proceedings for possession, under The Landlord and Tenant Act, were launched on 3rd March. *Held*, the landlord's proceedings must fail. The letter of 30th January did not of itself terminate the lease, since it was not a re-entry or a recognized equivalent. By accepting rent on 16th February, for that month, the landlord had recognized the relation of landlord and tenant as still subsisting. *Jardine et al. v. Attorney-General for Newfoundland et al.*, [1932] A.C. 275, applied. On 3rd March, the only rent which was owing was that for March, and that had not been owing for fifteen days, so as to make the section applicable.

Quaere, whether the maintenance of the distress after the writing of the letter destroyed the right of re-entry.

AN appeal by a tenant from the order of Shea Co. Ct. J., of the County Court of the County of York, under The Landlord and Tenant Act, R.S.O. 1937, c. 219, ordering the delivery up of the demised premises. The facts are fully stated in the judgment of ROBERTSON C.J.O.

7th May 1943. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and LAIDLAW JJ.A.

J. M. Bullen, K.C., for the appellant: It is submitted that a landlord cannot, during the currency of a lease, and before the expiration of the term, seize goods and chattels for the rent, and then forfeit the lease: *Whittaker v. Goggin* (1908), 38 N.B.R. 378, 4 E.L.R. 530; *Black v. Stebnicki*, 39 Man. R. 123, [1930] 2 W.W.R. 656, [1930] 4 D.L.R. 715. [ROBERTSON C.J.O.: The attitude of the respondent seems to be that the appellant has lost his rights under the lease because of non-payment of rent.] Surely it is not open to the landlord to distrain while claiming that the lease is forfeited. When the landlord sent the registered

letter, on 30th January 1943, advising the tenant that the lease was forfeited because of non-payment of rent, he was not entitled to forfeiture, because of the distress.

A. A. Macdonald, K.C., for the respondent: It is submitted that once the tenant has exposed himself to forfeiture by default, he cannot defeat the landlord's right to forfeiture by offering the rent. [ROBERTSON C.J.O.: When did the landlord exercise his right of forfeiture? Was it a present exercise of the right? It was not necessary to send a registered letter, but when he did, did not the letter say that the landlord would exercise his right to forfeiture in February?] The letter of 30th January was an exercise of the right of forfeiture. [ROBERTSON C.J.O.: In that event, rent would not be due, since the relationship of landlord and tenant no longer existed.] The tenant paid the February rent of his own volition. The value of the registered letter is that it is evidence that the landlord had elected to exercise this right of forfeiture. [LAIDLAW J.A.: Would it be permissible for the landlord to continue the distress and keep the bailiff in possession if there was no lease extant?] It was open to the landlord, after he declared the forfeiture, to engage a bailiff and distrain for rent. [LAIDLAW J.A.: The bailiff was kept in possession by the landlord during the period when no lease existed.] It is submitted that distress for the January rent in no way vitiated the landlord's right of forfeiture: *Re Bagshaw and O'Connor* (1918), 42 O.L.R. 466 at 474, 42 D.L.R. 596; *Re Gow and Downer*, [1935] O.R. 397, [1935] 3 D.L.R. 607.

[ROBERTSON C.J.O.: Rent was accepted after the writing of the letter.] Any act of the landlord, if it is to be interpreted as a waiver of forfeiture, must be unequivocal: *Re J. B. Jackson Ltd. and Gettas*, 58 O.L.R. 564, [1926] 2 D.L.R. 721. [ROBERTSON C.J.O.: The landlord exercised his right to forfeiture at the end of January, but said, in effect, the tenant might stay until the end of February and pay rent. In other words, he received his rent, then exercised the right to forfeiture.] If the right of forfeiture has arisen, surely the payment of rent does not alter the situation. [ROBERTSON C.J.O.: Has the landlord not lost his whole basis for the right to forfeit? You may have a continuing right of forfeiture, and you may have a right which is lost because the condition giving the right of forfeiture is corrected.] The landlord is bound by the registered

letter. Once the right to forfeiture has come into existence, it does not disappear by reason of anything the tenant may do after that time. [LAIDLAW J.A.: If your argument is correct, it would be open to the landlord to express his intention of forfeiting, to refrain from so doing, and to continue to collect rent for several months. Surely the landlord cannot do that and behave as though the lease were still in full force and effect.] It would appear that a landlord may be penalized for tolerance in permitting the tenant to remain on the premises, and for giving him time in which to vacate. The Court might take the view that a landlord was highly unreasonable if he insisted on immediate vacancy upon receipt of the registered letter of 30th January. If the tenant succeeds in his contention, the only protection for the landlord is to permit him to occupy the premises rent-free for an extended time.

J. M. Bullen, K.C., in reply: There was no distress in the case of *Re Bagshaw and O'Connor* (1918), 42 O.L.R. 466, 42 D.L.R. 596, and here the landlord distrained and continued the distress in February for the January rent. In *Re Gow and Downer*, [1935] O.R. 397, [1935] 3 D.L.R. 607, Riddell J.A. stated that the distress had been abandoned, in the present case the distraint has never been released. It is submitted that the respondent has not satisfied the first basic requirement, and there was never a right of forfeiture, even at the end of January. The rent had not been due for fifteen days after the bailiff went in.

Cur. adv. vult.

14th May 1943. ROBERTSON C.J.O.:—This is an appeal from the order of Judge Shea of the County Court of the County of York, made under The Landlord and Tenant Act, R.S.O. 1937, c. 219, on 10th March 1943, whereby he ordered appellant, the tenant, to deliver up possession to respondent, the landlord, of certain premises in the city of Toronto.

The premises were held by the appellant under lease dated 11th October 1941, for a term to expire on 1st October 1942, but before the term had expired it was extended to 30th September 1943. Rent at the rate of \$75 per month was payable on the first day of each month in advance.

Appellant made numerous defaults in the payment of rent, and the respondent, on such occasions, had to employ a bailiff to collect it. The rent due on 1st November 1942, and the rent

due on 1st December 1942 was collected through a bailiff in January 1943. The rent due on 1st January 1943 was not paid when due, and again the landlord put the matter in the hands of his bailiff, who made a distress for the rent.

While matters were in this position, and while the rent due on 1st January 1943 was still unpaid, the respondent wrote the appellant a letter, under date of 30th January 1943, the first paragraph of which is as follows:—

“As your lease is now forfeited because of non-payment of rent due January 1, 1943, we herewith give you notice that we must have vacant possession of the premises you occupy at 50 Glenview Ave. on February 28, 1943.”

The letter then proceeded to point out the many defaults in the payment of rent and the necessity for collecting through a bailiff, and concluded with these words, “because of your continued arrearages for long periods of time and our collection troubles, we must insist that this notice shall be irrevocable.”

The only evidence before the County Judge on the application for an order for possession was that contained in the affidavit of respondent's assistant manager. This affidavit set forth the facts as to the making of the lease, and its extension, and the default in payment of rent, and the collection of rent by the bailiff. Paragraph 11 of the affidavit is as follows:—

“Further default was made in payment of the rental for the months of January and February, 1943, and the rental for these months was paid to the bailiff on the 16th February, 1943.”

Then, after setting forth the contents of the letter of 30th January, the affidavit said that the tenant was still in possession and refused to give up possession, and that the landlord was entitled to possession “as the lease thereof has been forfeited and determined by reason of non-payment of rent.”

There is nothing in the material upon the application to indicate that the lease itself contains a provision for re-entry for non-payment of rent, and respondent relies upon the provisions of s. 17(1) of The Landlord and Tenant Act as giving it the right to re-enter if the rent reserved, or any part thereof, shall remain unpaid for fifteen days after any of the days on which the same ought to have been paid.

The contention of respondent's counsel is that by reason of the default existing on 30th January 1943, when the letter already referred to was written, it was entitled to re-enter “at

any time thereafter," according to the terms of s. 17(1). The contention is that by this letter the landlord put an end to the lease, although permitting the tenant to remain in possession until the end of February.

In answer to this appellant contends that at the time the letter of 30th January was written, and thereafter until the rent was actually paid on 16th February 1943, the respondent, in the exercise of its right as landlord, was maintaining, and continued to maintain, a distress of appellant's goods for the rent due on 1st January, and that the landlord could not, at the same time, be heard to say that it had put an end to the relationship of landlord and tenant from which the right of distress arose. Counsel cited *Whittaker v. Goggin* (1908), 38 N.B.R. 378, 4 E.L.R. 530, and *Black v. Stebnicki*, 39 Man. R. 123, [1930] 2 W.W.R. 656, [1930] 4 D.L.R. 715.

The facts on which appellant's contention in this respect is based are not fully set forth in the affidavit filed, nor in the supplementary admissions made for the purpose of this appeal, and contained in letters exchanged between solicitors, set forth in the appeal book. It is admitted that the bailiff made a distress on 15th January 1943, and that rental for the months of January and February was received on the 16th February, but the precise state of affairs after the distraint of 15th January, so far as the distress itself is concerned, does not appear. I do not think it is wise to rest our decision on this incomplete statement of the material facts, the more so as, in my opinion, the appeal can be disposed of upon another ground.

It will be observed that, notwithstanding the notice given by respondent in its letter of 30th January 1943 to the appellant, rent for the month of February was paid by the tenant and was received by the landlord. Respondent contends that, notwithstanding this, the letter of 30th January was an act by which it definitely, and once for all, put an end to the lease. The amount paid for the month of February, respondent says, should be regarded as a sum paid for use and occupation, or as mesne profits, and not as rent under the lease. Quite definitely it was paid as rent, according to respondent's own statement of the matter as contained in the affidavit of its manager, and in the letter of its solicitor.

The flaw in respondent's case is in assuming that the letter of 30th January had the effect now contended for, and in itself

was a declaration of forfeiture that put an end to the lease. The right that the landlord has under s. 17 of The Landlord and Tenant Act is a right to re-enter. This right can be exercised only by an actual re-entry, or by the issue of a writ, or taking such a proceeding as the present to recover possession. Notice of his intention to re-enter for non-payment of rent need not be given by the landlord (s. 18, subs. 2), and where given it is not effective to put an end to the lease when a re-entry is prescribed: *Moore v. Ullcoats Mining Company, Limited*, [1908] 1 Ch. 575 at 588. When the landlord has in fact re-entered, or has done the equivalent by taking proceedings to eject the tenant, his determination to exercise his right of forfeiture so evidenced is irrevocable.

Respondent, after its letter of 30th January 1943, and before the commencement of any proceedings, received rent for the month of February. This was a distinct recognition by respondent that the term was still in existence for that month. This circumstance distinguishes this case from *Re Bagshaw and O'Connor* (1918), 42 O.L.R. 466, 42 D.L.R. 596, where the rent tendered was already past due at the time of forfeiture, and it was said that its acceptance would not operate as a waiver of the right of re-entry. This distinction between the acceptance of rent overdue at the time of forfeiture, and the acceptance of rent accruing subsequent to the forfeiture, is fully apparent in the cases cited in the judgment in the case of *Re Bagshaw and O'Connor*.

The case of *Re J. B. Jackson Ltd. and Gettas*, 58 O.L.R. 564, [1926] 2 D.L.R. 721, is not helpful here, for in that case the right to forfeit arose not from default in the payment of rent, but from the breach of a covenant of a quite different nature, and notice by the landlord was necessary, and was an effective declaration of his intention to forfeit.

This case, therefore, reduces itself to this, that respondent, having, on 30th January 1943, a right to re-enter for non-payment of rent unpaid for fifteen days after the day when the same ought to have been paid, did not re-enter, as it was entitled to do (unless prevented by the distress, which need not be decided), but instead wrote appellant the letter of that date. On 16th February, appellant, being still in possession under the lease, paid not only the rent for January that had been overdue on 30th January, but also the rent for February, overdue since

1st February. Respondent received this rent, and there was no further payment of rent due until 1st March. This proceeding was begun on 3rd March, and there was then no rent remaining unpaid for fifteen days after the day when it should have been paid, and therefore there was no right of re-entry.

On this ground the appeal should be allowed, and the order appealed from should be set aside. Appellant is entitled to costs of the appeal, and to costs of the proceedings before the County Judge.

GILLANDERS J.A. agrees with ROBERTSON C.J.O.

LAILAW J.A.:—I have had the benefit of reading the reasons for judgment of the Honourable the Chief Justice of Ontario and respectfully agree with him. On 30th January the respondent had the right to re-enter the premises leased by it to the appellant and to determine the lease, because the rent then remained unpaid for more than fifteen days after the day on which it ought to have been paid. The respondent had the option to exercise its right or to refrain from doing so, as it might elect. The right could only be exercised by some unequivocal act to evince the intention of the lessor to avoid the lease. Such an act might be actual re-entry on the premises or the issue of a writ claiming possession: *Moore v. Ullcoats Mining Company, Limited*, [1908] 1 Ch. 575; *Wheeler v. Keeble (1914), Limited*, [1920] 1 Ch. 57; or commencing proceedings in ejectment: *Jones v. Carter* (1846), 15 M. & W. 718, 153 E.R. 1040; *Elliott v. Boynton*, [1923] 1 Ch. 422; affirmed [1924] 1 Ch. 236; or creating a new tenancy in possession: *Baylis v. Le Gros et al.* (1858), 4 C.B. (n.s.) 537, 140 E.R. 1201. But a lessor may waive the right of re-entry. Such waiver may be express or implied, and it is implied when the lessor, after the cause of forfeiture has come to its knowledge, does any act whereby it recognizes the relation of landlord and tenant as still continuing. See Hill, Complete Law of Landlord and Tenant, p. 404. A subsisting tenancy is thus recognized by the mere receipt of rent which has accrued due since the cause of forfeiture: *Pellatt v. Boosey* (1862), 31 L.J.C.P. 281; *Miles v. Tobin* (1867), 17 L.T. 432; *Pierson v. Harvey* (1885), 1 T.L.R. 430; *Jardine et al. v. Attorney-General for Newfoundland et al.*, [1932] A.C. 275, [1932] 1 W.W.R. 548. And the lessor in such a case is precluded from saying that it did not do the act with the intention

of waiving the forfeiture: *Toleman v. Portbury et al.* (1871), L.R. 6 Q.B. 245 at 248.

In my opinion the letter dated 30th January from the respondent to the appellant was of no effect in law. It was not such an unequivocal act on the part of the respondent as would constitute an exercise of its right of re-entry then existing. No other such act of the respondent is suggested and, therefore, I hold that there was no determination of the lease at that time. The letter can only be read as a statement that the lease would terminate on 28th February 1943, in consequence of failure by the appellant to pay rent due on 1st January 1943. See *Jardine v. Attorney-General for Newfoundland*, *supra*, at p. 284. Thus the lease continued and on 16th February rent was collected for both the months of January and February. Receipt of this rent was a recognition by the respondent that the relation of landlord and tenant then existed, and was a waiver of all its right of re-entry for non-payment of rent then overdue. In *Jardine v. Attorney-General for Newfoundland*, *supra*, Lord Russell of Killowen, at p. 286, says: “. . . if, as is the case here, the licensor has accepted rent with knowledge of breaches of conditions already committed, no forfeiture can take place grounded on any such breaches. The right to forfeit upon those grounds has been forever waived. A forfeiture subsequent to the last acceptance of rent can only take place by reason of some breach subsequently committed, or (if previously committed) subsequently discovered.” There was no such breach subsequent to 16th February and therefore the respondent did not have a right of re-entry at the time of commencement of these proceedings on 3rd March.

It was argued by counsel for the appellant that proceedings taken and said to have been maintained by the respondent, to distrain for arrears of rent, constituted a waiver of the respondent's right to re-enter the premises. I agree with the Honourable the Chief Justice that it is not necessary to decide this question. But it may be observed that the warrant is said to have been issued on 14th January and executed on 15th January. The respondent's right of re-entry did not accrue until after 15th January, and it has been held that the continuing in possession of a distress levied before the forfeiture is not a waiver. See *Doe d. Taylor v. Johnson* (1816), 1 Stark. 411, 171 E.R. 513.

The appeal should be allowed, and the order appealed from should be set aside with costs to the appellant of the appeal and of the proceedings before the County Judge.

Appeal allowed with costs throughout.

Solicitors for the tenant, appellant: McMaster, Montgomery, Fleury & Co., Toronto.

Solicitors for the landlord, respondent: Senior & Senior, Toronto.

[COURT OF APPEAL.]

Earnshaw v. The Dominion of Canada General Insurance Company.

Insurance—Accident Insurance—Exclusion of Indemnity for Loss Caused by Intoxication—Burden of Proof upon Insurer Relying upon this Exclusion—Validity of Exclusion—The Insurance Act, R.S.O. 1937, c. 256, s. 215.

Evidence—Degree of Proof Required—Allegation of Crime in Civil Action—Circumstantial Evidence—Sufficiency of Blood Test as Proof of Intoxication.

Where an insurer resists payment of an indemnity under a policy of accident insurance, basing its defence upon an exclusion, in the policy, of loss caused directly or indirectly by intoxication, it is not sufficient for it to prove that the insured was intoxicated at the time of the accident. It must establish not only the fact of intoxication, but also the further fact that the intoxication was a cause, direct or indirect, of the accident. Where such intoxication amounts to a criminal offence, *e.g.*, where the insured was driving a motor car at the time of the accident, and the evidence is wholly circumstantial, the degree of proof required is almost equal to that in a criminal prosecution; the Court should be satisfied not only that the circumstances proved are consistent with the commission of the suggested act, but that the facts are such as to be inconsistent with any other rational conclusion. *The London Life Insurance Company v. Trustee of the Property of The Lang Shirt Company, Limited*, [1929] S.C.R. 117 at 126, affirming 62 O.L.R. 83 at 93, applied.

Quaere, whether a finding of intoxication can ever be safely made solely on the results of a blood test showing a certain percentage of alcohol in the blood, without evidence of observable clinical symptoms of intoxication.

AN appeal by the plaintiff from the judgment of Makins J., after a trial without a jury, dismissing her action to recover an indemnity payable under a policy of accident insurance, following the death of the insured after an automobile collision. The facts are fully stated in the judgment of ROBERTSON C.J.O.

16th and 17th March 1943. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and LAIDLAW JJ.A.

J. R. Cartwright, K.C., for the plaintiff, appellant: The trial judge erred in finding as a fact that the deceased was intoxicated when he met his death. He failed entirely to direct himself as to the onus where the defence amounts to an allegation of a criminal offence. The evidence points to sobriety rather than intoxication, and at most it raises no more than a probability of intoxication, whereas the appellant is entitled to demand proof as clear as in a criminal case: *The London Life Insurance Company v. Trustee of the Property of The Lang Shirt Company, Limited*, [1929] S.C.R. 117 at 126, [1929] 1 D.L.R. 328, 51 C.C.C. 31.

Clause 12 of the policy, containing the exclusion, is void and of no effect, because it is in reality an attempt to add to the statutory conditions, and does not comply with s. 215 of The Insurance Act, R.S.O. 1937, c. 256: *Johnson v. The British Canadian Insurance Company*, [1932] S.C.R. 680 at 686, [1932] 4 D.L.R. 281.

In any event, the exclusion is inapplicable, since the words of the policy, giving them the widest possible interpretation, contemplate that the injury or death must be caused by intoxication. Even if there is sufficient evidence that Earnshaw was intoxicated, there is no evidence that his intoxication caused the accident; no causal connection is shown. The words "directly" and "indirectly", as they appear in such clauses, must be interpreted with reference to the facts of each particular case. The decisions depend greatly upon the exact wording of the policy in each case. I refer to *Winspear v. The Accident Insurance Company, Limited* (1880), 6 Q.B.D. 42 at 45; *Wadsworth v. The Canadian Railway Accident Insurance Company* (1914), 49 S.C.R. 115, 16 D.L.R. 670; *Lawrence v. The Accidental Insurance Company Limited* (1881), 7 Q.B.D. 216; *Coxe v. Employers' Liability Assurance Corporation, Limited*, [1916] 2 K.B. 629. [ROBERTSON C.J.O.: Why might not intoxication in this case be the cause of death?] It is not proved even to have been a *causa sine qua non*. [ROBERTSON C.J.O.: The trial judge regarded the accident itself as evidence of intoxication.] There must be a causal connection clearly established.

E. A. Richardson, K.C., for the defendant, respondent: The evidence more than justified the trial judge's finding that the deceased was intoxicated, and consequently the claim is barred by clause 12. It is well established that this Court will not inter-

fere with a finding where there is evidence upon which such a finding can be based: *Home Insurance Company of New York et al. v. Lindal and Beattie*, [1934] S.C.R. 33 at 36, [1934] 1 D.L.R. 497; *McMillan v. Murray*, [1935] S.C.R. 572, [1935] 4 D.L.R. 666; *Coxe v. Employers' Liability Assurance Corporation, Limited*, [1916] 2 K.B. 629. [GILLANDERS J.A.: Is there any evidence as to the deceased's driving which clearly points to intoxication? Apparently he did not run up on the boulevard or lose control of his car.] [ROBERTSON C.J.O.: The main difficulty with the expert evidence is that it shows too high a degree of intoxication. If the tests are correct, surely the man could not have sat up, let alone drive a car.] Individuals react differently to the same amount of alcohol; what would incapacitate one person leaves another able to proceed more or less normally. [ROBERTSON C.J.O.: If you allow for the possibility of exceptional cases, possibly this deceased was not intoxicated at all. It is very difficult to apply tests with certainty where there is such a divergence of reaction in different individuals.] The evidence is definite that the tests were proper and accurate, and they establish that the deceased had 14 ounces of liquor in his system. We do not need Dr. Rogers's opinion where there is this uncontradicted statement of fact.

[ROBERTSON C.J.O.: In a case of this nature, which is a civil action but where it is necessary for the respondent to establish a breach of criminal law by the other side, the evidence must be substantially the same as would secure a conviction in the criminal courts. The effect of the decision in *The London Life Insurance Company v. Trustee of the Property of The Lang Shirt Company, Limited*, [1929] S.C.R. 117, [1929] 1 D.L.R. 328, 51 C.C.C. 31, is that instead of applying the rule of the balance of probabilities as in civil cases, the evidence must prove the respondent's contention beyond a reasonable doubt. This is not a matter of probability—it is a matter of certainty.]

The important question is whether death was directly or indirectly caused by alcohol. There is discussion of the true meaning of the words "directly" and "indirectly" in the *Coxe* case *supra* and in Welford on Accident Insurance, 2nd ed., at 185. In the case at bar, the respondent may go to the remote cause of death to prove its contention. An insurance company is permitted to insert in a policy a clause limiting the risk or liability: *The Continental Casualty Company v. Casey*, [1934]

S.C.R. 54, [1934] 1 D.L.R. 577, a leading authority, completely covers the case at bar. It is established that there is a distinction between a condition and limitation of the risk: *Sun Insurance Office of London, England v. Roy*, [1927] S.C.R. 8, [1927] 1 D.L.R. 17.

B. O'Brien, for the defendant, respondent: At the conclusion of the plaintiff's case, a motion was made for dismissal of the case on the ground that two illegal acts had been committed by the deceased: (1) dangerous driving, under s. 285(6) of The Criminal Code, R.S.C. 1927, c. 36; and (2) careless driving under s. 27 of The Highway Traffic Act, R.S.O. 1937, c. 288. After the evidence was put in, there was established a third unlawful act: operating a vehicle while intoxicated, s. 285(4) of The Criminal Code. It is submitted that by reason of these unlawful acts, it is against public policy for indemnity to be paid. Even if the intoxication aspect is eliminated, there is still dangerous driving. [ROBERTSON C.J.O.: There has been no finding made about dangerous driving. The other two unlawful acts are dependent upon a state of intoxication and would be relevant to your argument concerning the exclusion clause, but it does not follow if you eliminate intoxication.] There are innumerable authorities which state that it is contrary to public policy to pay a claim arising from the doing of unlawful acts: *Burrows v. Rhodes and Jameson*, [1899] 1 Q.B. 816; *Ingles v. The Sun Life Assurance Co. of Canada*, [1937] O.R. 373, [1937] 1 D.L.R. 706, 4 I.L.R. 111; *O'Hearn v. Yorkshire Insurance Co.* (1921), 51 O.L.R. 130, 67 D.L.R. 735; *London Guarantee and Accident Company v. Sowards*, [1923] S.C.R. 365, [1923] 2 D.L.R. 495, [1923] 2 W.W.R. 113. [LAIDLAW J.A.: Is a breach of The Highway Traffic Act sufficient to deprive an assured or his beneficiary of their rights under the policy? Where would the line be drawn?] It is submitted that a breach of any regulation is unlawful, no matter how minor, and if such an act is committed, indemnity cannot be paid.

J. R. Cartwright, K.C., in reply: The *Lang Shirt Company* case states that the onus is the same in civil cases where the defence rests on the commission of crime as in criminal cases. With reference to *Johnson v. The British Canadian Insurance Company*, [1932] S.C.R. 680, [1932] 4 D.L.R. 281; *Curtis's and Harvey (Canada), Limited v. North British and Mercantile Insurance Company, Limited*, [1921] 1 A.C. 303, 55 D.L.R. 95,

[1921] 1 W.W.R. 389; *The Continental Casualty Company v. Casey*, [1934] S.C.R. 54, [1934] 1 D.L.R. 577, the case at bar is distinguishable from the *Johnson* case because in the latter there was no statutory condition that even remotely touched the matter of leasing or hiring. The *Casey* case did not fully appreciate the discussion in the *Curtis* case. There is a distinction between the *Johnson* and the *Curtis* case. In the latter, it is clear that no one could say, from reading the policy, whether the peril was insured against or not.

The question of public policy was not raised in the pleadings; there were no facts pleaded in defence except that the deceased was intoxicated. Similarly, this Court cannot make a finding concerning dangerous driving when it was not raised in the pleadings.

It is submitted that the rights of a beneficiary are not affected by a question of public policy. If the insurance company is desirous of raising these matters, it should put the other side on notice. The reliance placed by the respondent on the case of *London Guarantee and Accident Company v. Sowards*, [1923] S.C.R. 365, [1923] 2 D.L.R. 495, [1923] 2 W.W.R. 113, is vitiated by reason of the fact that any expressions of opinion in the Supreme Court of Canada are only dicta. The English cases are opposed to the view of the Court in *O'Hearn v. Yorkshire Insurance Co.* (1921), 51 O.L.R. 130, 67 D.L.R. 735. For example, *Tinline v. White Cross Insurance Association, Limited*, [1921] 3 K.B.D. 327, in which it was held that if the insured did not intend to injure the person, then it was not against public policy to indemnify him. In the case at bar, there is nothing to indicate that the deceased set about getting drunk. In the *O'Hearn* case, *supra*, indemnity could only arise because a wrongful act had been committed. In the present case it is only necessary to establish that the assured was killed accidentally. The respondent company has entered into a contract to pay indemnity in certain circumstances, and the appellant is entitled to that indemnity. The Court should inquire what is public policy to-day, not in January 1942. All that public policy guards against is a person benefiting from his intended unlawful act. A man cannot benefit from the direct result of his own evil act: *Beresford v. Royal Insurance Company, Limited*, [1938] A.C. 586 at 596. The Court in that case expressly left open the question of the rights of persons who have

any claim for insurance. The beneficiary in the present instance may well be, in the eyes of the law, a purchaser; when the matter is not raised in the pleadings it should not be decided against her. The appellant rests her case mainly on the basis that the respondent has not satisfied the onus upon it. It has not been proved that the deceased was intoxicated, or that intoxication was the cause of the accident and subsequent death. It was not necessary for the appellant to prove that a wrong had been done. [LAIDLAW J.A.: If during the course of the trial the defendant raises the inference of intoxication, does that shift the onus to plaintiff to show the deceased was sober?] If the defendant goes back into remote causes, then that is matter for the other side to bring forward.

Cur. adv. vult.

5th May 1943. ROBERTSON C.J.O.:—An appeal from the judgment of Makins J., dated 13th January 1943, on the trial of the action before him, without a jury, at Toronto. The appellant, who is the plaintiff in the action, is the administratrix of the late Arthur Earnshaw, and his nearest of kin, and is the designated beneficiary in case of death by accident, under a policy of accident insurance issued by respondent to Arthur Earnshaw. The action is brought on the policy, Arthur Earnshaw having been killed in an automobile accident early in the morning of 1st January 1942.

By the policy of insurance, which is dated 27th June 1935, respondent insured Arthur Earnshaw, subject to the provisions, conditions and limitations therein set forth “against loss resulting directly and independently of all other causes, from bodily injuries sustained during the term of this Policy, solely through external, violent and accidental means”. The sum payable for loss of life is \$7,500.

The policy contained the following clause, numbered 12 and headed “Exclusions”:—

“This insurance shall not cover accident, injury, disability, death or other loss caused directly or indirectly, wholly or partly by bodily or mental infirmity, intoxication, hernia, ptomaines, bacterial infections (except pyogenic infections which shall occur with and through an accidental cut or wound), or by any other kind of disease, nor shall it cover suicide, sane or insane, or any attempt thereat, sane or insane; nor shall it cover any

person over the age of sixty-five years, and shall not be renewed after the Insured has reached the specified age. Any premiums paid by or on behalf of any person over the specified age shall be returned upon request."

It is upon this clause that the dispute in the action rests. Respondent admits the issue of the policy, and that it was renewed from year to year, and was in force at the date of the accident. Paragraph 5 of the statement of defence is as follows:—

"The Defendant says that it is not liable to make any payments under the said policy because the death of the said Arthur Earnshaw was caused directly or indirectly, wholly or partly, by intoxication, as set out in section 12 of the said Policy."

The learned trial judge gave effect to this defence and dismissed the action. Counsel for appellant, on the argument of the appeal, took the objection that clause 12 of the policy on which respondent relied is a variation of or an addition to the statutory conditions, and that s. 215 of The Insurance Act, R.S.O. 1937, c. 256, had not been complied with, and that, therefore, the clause is not binding. Apart from that objection, his main contentions, briefly stated, were (1) that upon the evidence it should not have been found that Arthur Earnshaw was intoxicated at the time of the accident, and (2) that the evidence did not warrant a finding that the death of Arthur Earnshaw was caused directly or indirectly, wholly or partly by intoxication.

These are both questions of fact, but, there being no real dispute, on the evidence, that the death of Arthur Earnshaw was caused by an accident, the burden was, clearly, upon the respondent to establish that Arthur Earnshaw was in fact intoxicated at the time of the accident, and that his intoxication was directly or indirectly, wholly or partly a cause of the accident.

At the time of the accident Earnshaw was driving his motor-car on a public highway, and was in collision with another motor-car, as the result of which he sustained injuries from which he shortly died. Appellant contends that respondent's allegation of intoxication in these circumstances involves the allegation of the commission of a crime by the insured, and that there must be applied here the rule of evidence applied by the Supreme Court of Canada in *The London Life Insurance Company v. Trustee of*

the Property of The Lang Shirt Company, Limited, [1929] S.C.R. 117, [1929] 1 D.L.R. 328, 51 C.C.C. 31, where Mignault J., in delivering the judgment of the majority of the Court, at p. 126, quoted, with approval, the statement of the rule by Middleton J.A. in the same case in this Court, *sub nom. Lang Shirt Co's Trustee v. London Life Insurance Co.*, 62 O.L.R. 83 at 93, [1928] 2 D.L.R. 449. That statement is the following:—

“ . . . while the rule is not so strict in civil cases as in criminal, I think that when a right or defence rests upon the suggestion that conduct is criminal or quasi-criminal the Court should be satisfied not only that the circumstances proved are consistent with the commission of the suggested act but that the facts are such as to be inconsistent with any other rational conclusion than that the evil act was in fact committed.”

In my opinion, that rule is applicable in the present case. If Earnshaw's conduct was as respondent alleges, it constituted an offence under s. 285 of The Criminal Code, R.S.C. 1927, c. 36.

Whether the trial judge had this rule of evidence present to his mind in weighing the evidence in this case, he does not state, and there may be some ground appearing in his reasons for judgment, as will hereinafter be discussed, for thinking that he did not apply the rule. In any case it is our duty now, on this appeal, to apply it.

Arthur Earnshaw was an accountant, 49 years of age. He was a bachelor, living in Toronto with his mother, a widow, over 80 years of age. At the time of his death and for some time prior thereto, Earnshaw was engaged in association with the witness Lyden in performing certain services for an association of manufacturers of war munitions in the way of expediting production. They had been together in Ottawa and Montreal on that business in the last days of December 1941, and Earnshaw had returned to Toronto from Montreal by train, arriving at Toronto on the morning of 31st December. Lyden testifies that both he and Earnshaw were busy at their office all that day until about 3.30 p.m., lining up steel allocations for the first six months of 1942, that being the matter on which they were in Ottawa that week. Lyden says that there was no drinking either on the trip or on 31st December in the office. Earnshaw left the office at about 3.30 p.m.

Two other men, one a former business associate of Earnshaw, cover, in succession, the period from 3.30 p.m. until Earnshaw

went home to dinner at about 7 p.m. The first of these men says Earnshaw had nothing to drink while in his company. The second says that he and Earnshaw had each two glasses of beer. Each of these men swears that Earnshaw was sober when they parted. Earnshaw's mother, the appellant, says that he was sober when he came in for dinner, and further, that he remained at home with her until about 11.45 p.m., and that in that time he had no liquor to drink, and was quite sober. These witnesses all testify that Earnshaw was a temperate man; that while occasionally he took a drink, they had never seen him the worse of liquor. No liquor was kept in his mother's home, and, according to a considerable body of testimony, he was not a drinking man as that expression is commonly used. The evidence of the mother as to Earnshaw's condition on his arrival for dinner, and as to how the evening was spent and his condition at the end of it, is fully supported by the evidence of a lady, a friend of Mrs. Earnshaw's, who had come over to stay with Mrs. Earnshaw while her son was away that week.

Earnshaw went out again at about a quarter to twelve. He had omitted to call for a parcel of meat for the next day's dinner, that his mother had ordered by telephone from their butcher early in the day. The butcher was a friend of Earnshaw's, named Clarke, and it appears from his evidence that Earnshaw, on leaving home a little before midnight, had gone in his motor-car, first to the butcher-shop, and finding it closed, had driven down to Clarke's house. Clarke had taken the parcel to his own home when it had not been called for, and Earnshaw went there to get it. It was said by appellant's counsel, in the course of the trial, that the parcel was found in Earnshaw's car after the accident. This statement was not challenged, but I have not been able to find that any witness gave that evidence.

However that may be, the place of the accident was on Earnshaw's direct road home from Clarke's house to his mother's. Both Mr. and Mrs. Clarke say that Earnshaw remained talking with them until 2 a.m. While there he had one small glass of whisky, and drank nothing more. They swear that he was sober when he left for home. His road home was west on King Street to Sunnyside, then along the Lake Shore Road to Windermere Avenue, the first street east of the Humber River; there he would turn north. The traffic at this time was fairly heavy, but he evidently got along safely until, driving

west on the Lake Shore Road he approached Windermere Avenue. There are stop-lights at that intersection, and the witness Duff, who was also driving west on that road, says that when he was some 200 feet east of the intersection the light changed against him. While Duff was bringing his car to a stop, but before it had stopped, it was struck from behind by Earnshaw's car, and was pushed forward against the car immediately ahead of him. There appear to have been at least five cars in a row between Earnshaw's car and the intersection.

Getting out of his car, Duff went back to Earnshaw's car and found Earnshaw crouched over the steering-wheel and moaning. Others came to help and Earnshaw was lifted out of his car, unconscious, and placed on the boulevard. Later he was taken in an ambulance to a hospital not far distant, but he was dead when Dr. Lawson, the coroner, saw him at about 3 a.m., the accident having occurred about an hour earlier. A post-mortem examination disclosed several fractured ribs and a rupture of the heart.

The witnesses called for the defence were, none of them, persons who had known Arthur Earnshaw, or who saw him alive, and none of them were eye-witnesses of the accident. Dr. Lawson, the coroner, and Dr. Burr, who, on his instructions, performed a post-mortem examination, gave evidence that led up to the evidence of another witness, Miss Vincent, who made a test of a sample of blood taken from the body of the deceased at the time of the post-mortem examination to determine its alcoholic content. Dr. Lawson and Dr. Burr both also gave evidence as to the condition that a man would be in so far as intoxication is concerned, if he had certain quantities of alcohol in his blood. Neither of them professed to be an expert in determining intoxication by blood test, but Dr. Lawson, in particular, had had a wide experience as coroner with cases where blood tests had been made of persons known to be, or suspected of being, intoxicated, and in that way he had acquired a knowledge of the proportion of alcohol to be found in the blood of a man whose actions indicated a state of intoxication. What Dr. Lawson termed "clinical manifestations of being intoxicated" were no doubt in his judgment the surest evidence of intoxication, but the indications by blood test were valuable as corroborative evidence. When asked by the trial judge whether, even apart from clinical symptoms, he would think a man intoxicated where the

alcoholic content in the blood was around four points, his answer was "If his clinical symptoms were that of being entirely sober and he showed no manifestations of being drunk at all and showed a blood of four I would have to perhaps believe it, but I would be surprised."

Miss Vincent, who is on the staff of the Attorney-General of Ontario, and whose duty it is to make all sorts of laboratory tests, made the test of the sample of deceased's blood furnished her by Dr. Burr. She has had a good deal of training and experience. Besides a university course in science and a year's post-graduate work in blood chemistry, she was for six years doing blood chemistry at one of the Toronto hospitals. After that she spent several years working with the late Dr. Frankish in the Attorney-General's Department, where she was engaged in laboratory work, including tests of the kind she had to make in the present instance. She says that she found, as the result of her test, that the sample of deceased's blood contained 4.2 parts of absolute alcohol in one thousand parts of blood. This was by volume. By weight it would be approximately 3.3.

Counsel for appellant sought before this Court to cast doubt on the value, or rather the relevance, of Miss Vincent's report by suggesting that the evidence is lacking in that it fails to properly identify the sample that Miss Vincent tested as the sample Dr. Burr had obtained on the occasion of his post-mortem examination. Dr. Burr did not deliver the sample to Miss Vincent until 3rd January, two days after he had taken it. Miss Vincent did not do her final work upon it until 5th January. It was suggested in argument that there was no evidence of any identifying mark on the container, and that there might, by mistake, have been a substitution. Dr. Burr stated definitely in his evidence that he delivered to Miss Vincent the sample he had taken of the deceased's blood, and Miss Vincent stated definitely that her test was a test made of the sample she received from Dr. Burr. In these circumstances, if counsel for appellant desired to contend that the evidence of identification was defective or insufficient because the means or method of identification was not stated, or because there was none, in my opinion the time to raise that question was when these witnesses were giving their evidence. No objection was taken that evidence of the result of the test was inadmissible because the witnesses did not state how they identified the sample, and I do

not think that objection can be taken now. No doubt appellant's counsel is fully at liberty to argue, in view of the conflict between the evidence in relation to Earnshaw's habits and conduct and the evidence afforded by the blood-test, that there is room for error and mistake in the making of blood-tests, even without evidence of any specific error or mistake, but I do not think it would be proper to allow an objection that the result of the blood-test is not admissible in evidence here on the ground that the sample was not identified.

Dr. Rogers, Professor of Chemistry at Toronto University, was also called as a witness for the defence. There is no question of his standing and ability as a chemist. He has done a great deal of experimental work in the determination of alcohol in the blood and other organs of the body, and he is widely read in the literature on the subject. He has been consultant in chemistry of the Attorney-General's Department. He approved of the method used by Miss Vincent in making the blood test in this case. It is his opinion that when a man weighing 150 pounds has in his blood one part of alcohol, by weight, in a thousand, that he has in his system four and one-half ounces of legal liquor, meaning whisky as defined in The Foods and Drugs Act. The man will actually have consumed more than that quantity, but a certain amount of it has decomposed. In the case in hand, on that basis Arthur Earnshaw had in his system at the time of the accident, fourteen ounces of whisky, and had actually consumed more than that. Dr. Rogers says that he cannot see how a man would be sober with such a quantity of alcohol in him—he would be intoxicated. Dr. Rogers explained, however, his understanding of the term "intoxicated". What Dr. Lawson termed "clinical manifestations" need not be evidence, in his opinion; nor, on the other hand, would he accept the suggestion of appellant's counsel at the trial that "intoxication" is a state of mind. Dr. Rogers said "If one takes the broad sense of the meaning of intoxication, it means a poisoning and of course poisoning means that condition which is brought on a human body or other body whereby some substance taken into it impairs or destroys our bodily functions." He willingly admitted that different types of men have a different tolerance of alcohol. He himself had had a recent case where the blood test showed over four parts of alcohol per thousand, and yet the physician who examined the man and took the blood

specimen could not pronounce the man intoxicated from his clinical examination.

Dr. Avery, a practising physician, was called for the appellant in the course of the case for the plaintiff, and therefore before the evidence of the blood test. In some respects his evidence would have been more fitting in reply. He also had made a special study of the matter of intoxication by alcohol. He said that the liquor consumed by Arthur Earnshaw, according to the evidence of appellant's witnesses, would not affect him at all by the time of the accident. In his opinion, in Ontario the knowledge of the subject of determination of intoxication by blood-test was derived entirely from literature on the subject, and he thought no such test infallible without corroboration by clinical symptoms. He illustrated by a case to which he was called after a motor-car accident, and where an examination of the driver was conducted by himself and a police sergeant. After a careful clinical examination, which he described, they decided the man was sober. A blood-test was also made, and four parts of alcohol per thousand were reported. A "mistake in technique" in the blood-test was later reported, he said. The substance of his evidence would seem to be that, in his opinion, not enough is known with certainty about the blood-test to make it sufficient evidence of intoxication "without seeing the man clinically drunk."

The foregoing is a general outline of the evidence presented, although there are many details that I have omitted. The trial judge was of the opinion that Earnshaw was intoxicated at the time of the accident, but he made no distinct finding that intoxication was a cause of the accident. In truth it would appear from his reasons for judgment that the trial judge considered that the finding of intoxication as a fact was sufficient upon which to base his judgment dismissing the action. His reasons for judgment begin as follows:

"HIS LORDSHIP: In this case the question of whether or not the plaintiff is entitled to succeed turns on whether or not the insured Arthur Earnshaw was intoxicated at the time of the accident which caused his death. There is no doubt in my mind the policy covers that occurrence."

There is nothing in the reasons for judgment to indicate that, when deciding the issue as to intoxication, the learned trial judge had present to his mind the rule of evidence ap-

plicable in this case that placed more than the ordinary burden of proof upon the respondent, as laid down in the *Lang Shirt Company* case, already referred to. He had to consider, on the one hand, the evidence of the witnesses who knew Earnshaw and were acquainted with his habits, and who were in his company until a few minutes before the accident. As against this was the evidence of the blood-test, and, to a limited extent, the evidence of experts, but not the evidence of anyone who had seen Earnshaw before the accident. The trial judge had an advantage that we have not in that he saw and heard the witnesses. What opinion he formed of any of them he does not say, but he could not find Earnshaw intoxicated on the strength of the blood-test, and at the same time accept the evidence of witnesses who said that a few minutes before the accident he was quite sober and had had very little to drink.

The meaning to be attached to the word "intoxicated" in the policy is important. Is an insured person to be deemed intoxicated within the meaning of the policy when a certain number of parts of alcohol per thousand are found in his blood, although discoverable clinical symptoms of intoxication are absent, or, on the other hand, are such symptoms necessary to a finding of intoxication? Dr. Rogers may be right that the poison is in the system, and that it is operating in some way, perhaps not noticed but none the less to the deterioration of the subject; but does Dr. Rogers really know that or is it only surmise or an unproved deduction? Is there not still the possibility that some persons are not affected at all or to any appreciable degree by the consumption of a large quantity of whisky? It may well be that until more is known with certainty, it is unsafe to build too much upon a blood-test uncorroborated by other symptoms. In the meantime it may be prudent to confine the application of the word "intoxicated" to cases where recognizable symptoms of it are observable. I think it is not necessary, and it is therefore perhaps undesirable, to pursue this particular part of the inquiry to a conclusion. It is, in my opinion, clear that the respondent did not establish, with that high degree of proof necessary to its success in the defence of this action, the fact that intoxication, if present, was a cause of the accident.

As I have already stated, the learned trial judge appears to have overlooked the necessity of finding whether or not the

accident was caused directly or indirectly, wholly or partly by intoxication. It is true that the learned judge did say that the accident itself was significant of Earnshaw's condition, but he concluded his remarks upon that subject as follows: "That in itself I say is some indication of his condition, although there is always the possibility of it happening were he sober". Quite obviously the learned judge did not have it then in mind that this case is not one to be decided on a balance of probabilities, but that the facts must be such as to be inconsistent with any other rational conclusion than that relied upon by the respondent in its defence. The declaration that there is always the possibility of the accident happening if Earnshaw were sober is really a finding that, for the purposes of this case, is against the respondent. The respondent's defence under clause 12 of the policy must be, not that Earnshaw was intoxicated and an accident happened, but that Earnshaw was intoxicated and that directly or indirectly, wholly or partly, the accident was caused by his intoxication. That it was in any sense caused by intoxication can, in the circumstances of this case, only be, at best, a matter of inference, and that inference is not to be made if there can be any other rational conclusion. The learned trial judge has plainly expressed his opinion that there is room for another rational conclusion.

It must be always borne in mind that from the time Earnshaw left Clarke's until immediately after the accident, none of the witnesses saw him. No one can say that he was driving, or in any way acting, like an intoxicated man, except in so far as the mere occurrence of this accident may indicate. For all that appears in evidence, he may have been able to control his car, and in fact he may have been one of the individuals, exceptional it is true, whom, according to all the expert witnesses, they come across, and who remain sober notwithstanding the consumption of a large quantity of whisky. The learned trial judge says that Earnshaw escaped earlier mishap while driving in heavy traffic because he was fortunate. That, with respect, is mere assumption. He may have been quite capable of driving safely, and it is right to assume that he was, until the contrary is clearly proved. The fact that respondent must establish is that the very accident that did happen was caused, directly or indirectly, wholly or partly, by Earnshaw's intoxication. The fact that he drove through heavy traffic for a distance, put by

Dr. Burr at one and a quarter miles, without accident, is not to be put away by the remark that he was fortunate. It affords some ground for an inference that he was in a condition to drive safely.

There is something more to be gathered from the evidence of Earnshaw's ability to drive his car. When he reached Sunnyside he had a choice of two roads, both going west and separated only by a boulevard, one, a wide, well-lighted road on the south, close to the lake shore; the other, a narrower road on the north, not so well-lighted and encumbered with street-car tracks on which street-cars were then running. The north road was the more convenient road from which to make a right turn up Windermere Avenue. Earnshaw took the north road. Then, as he approached the intersection where he was to turn to the right into Windermere Avenue, he was well over, or was getting well over, towards the right curb, as required by the rule of the road (The Highway Traffic Act, R.S.O. 1937, c. 288, s. 39 (1)(b)); see evidence of Neale. At the moment of collision the car just ahead of him was further out from the north curb, as is shown by the damage the two cars received in the collision, the left front of Earnshaw's car having struck the rear of Duff's car on its right side.

There is no suggestion in the evidence of high speed or of wild driving on the part of Earnshaw. He did not run off the pavement, nor collide with a lamp post, nor drive erratically along the pavement, things that are commonly done by an intoxicated driver. The collision itself occurred, not at the intersection, but at a distance of about 200 feet east of the intersection, a greater distance than is usual in stopping for a traffic light. A sober driver might be taken unawares by a block in traffic so soon. Duff's car had a defective red lamp at the rear, according to the witness Neale. Sometimes it would not light at all, and when it did light, it was dim. Further, the pavement was wet. These are matters to be taken into account in deciding whether or not the only reasonable explanation of the accident is that Earnshaw was intoxicated. If Earnshaw were alive, some explanation from him naturally would be looked for, but Earnshaw is not alive. The opinions of the owners of cars ahead of him as to his condition are not even admissible. There were really no eye-witnesses of the actual occurrence. Mere negligence on the part of Earnshaw would not relieve respondent, and I am

unable to regard the accident as one that may not reasonably be attributed to even momentary negligence, such as in Earnshaw not keeping a proper look-out ahead, not expecting to have to stop so soon, and possibly being engaged rather in getting his car closer to the north curb for his right-hand turn into Windermere Avenue. One cannot sit long in this Court without learning that less excusable motor-car accidents occur where there is no suggestion of intoxication. In fact, I think I am in agreement with the learned trial judge, in thinking that there is always the possibility of the accident happening were Earnshaw sober.

Counsel for the appellant argued that clause 12 of the policy upon which respondent relies is invalid and is not binding because of the provisions of s. 215 of The Insurance Act. He contends that this clause is in its essence an addition to the statutory conditions. It is not necessary to pass upon this contention in view of my opinion on the matter already discussed, but my inclination is against it. Appellant's counsel also argued that in any event the exclusion clause is not applicable in this case. I am not able to agree with him in that contention either. In my opinion, however, the defence fails because no finding can be made properly upon the evidence in this case that the accident was caused by intoxication.

The appeal should be allowed, and the appellant should have judgment for the amount of the policy, with interest, and for costs both of the action and of the appeal.

GILLANDERS J.A.:—I agree and have nothing to add.

LAILAW J.A. (*dissenting*):—The plaintiff appeals from a judgment of Makins J., dated 13th January 1943, whereby an action to recover the principal sum of \$7,500 under a policy of insurance, issued by the defendant, was dismissed with costs.

The policy is described as "The Dominion 'Victory' Accident Policy", and, subject to the provisions, conditions and limitations set forth in it, the defendant insured Arthur Earnshaw against "loss resulting directly and independently of all other causes, from bodily injuries sustained . . . solely through external, violent and accidental means". The plaintiff was named as beneficiary of insurance payable in case of death by accident.

About two o'clock on the morning of 1st January 1942, the insured was driving alone in his automobile in a westerly direction on Lake Shore Road in Toronto. There were three motor

cars in front of him and proceeding in the same direction. When he was approaching Windermere Avenue, an intersecting street, his car collided with the rear of the one next in front of him, which was then practically stopped, and each of the cars in turn then collided with the one next in front. Mr. Earnshaw was injured, and died very shortly after the accident from a ruptured heart.

The defendant says that "it is not liable to make any payments under the said policy because the death of the said Arthur Earnshaw was caused directly or indirectly, wholly or partly, by intoxication, as set out in section 12 of the said policy."

There are two principal questions to be determined: (1) Was the late Arthur Earnshaw intoxicated at the time of the accident? (2) If so, what is the effect in law of such intoxication on the rights of the parties?

The learned trial judge has found as a fact that "at the time of this accident which caused Arthur Earnshaw's death he was intoxicated." Counsel for the appellant argues that this finding is not justified upon the evidence, and is contrary to the weight of the evidence. He urges (1) that there was no clinical evidence of drunkenness, and that in the absence of such evidence a finding of intoxication should not be made; (2) that the finding depends on the result of an analysis of a sample of blood which is not sufficiently identified as being the one taken from the body of the deceased; (3) that the learned trial judge failed to properly direct himself as to the onus upon the defendant.

I think that effect cannot be given to these arguments and that the appeal cannot succeed on this ground. The trial judge realized fully the paramount importance of this question of fact. He stated at the very beginning of his reasons for judgment that "the question of whether or not the plaintiff is entitled to succeed turns on whether or not the insured Arthur Earnshaw was intoxicated at the time of the accident which caused his death." He did not rely solely on evidence showing the alcoholic content in the blood of the deceased, but considered also the circumstances under which the accident occurred. He decided that they were "significant" of Earnshaw's condition. He was properly entitled to infer that the actions of the deceased were not those of a sober man, and that they were consistent with and corroborative of a state of intoxication. I do not decide that the result of a blood analysis showing the presence of some

percentage of alcohol is conclusive in all cases that a person is intoxicated, or that he is unfit to drive a motor vehicle. But in this particular case some intoxication, at least, is admitted by Dr. Avery, the only expert witness called on behalf of the plaintiff. On cross-examination the following questions and answers are found in his evidence:—

“Q. I say an accurate and proper test of an individual, of an average individual shows after his death that he has from four to five parts of alcohol in his blood, does that indicate that he is intoxicated or not? A. I would think he would have some intoxication of alcohol, but he would not necessarily be inebriated.

“Q. What do you mean by intoxication of alcohol? A. That means he has a lot of alcohol in his blood, if the tests are correct.”

There is no evidence to show that the laboratory tests for alcohol in the blood sample analyzed were incorrect. Moreover, the identification of the blood sample with the deceased is sufficiently shown in evidence. The sample was taken by Dr. Burr, and by him personally delivered to the technician who made the test. She describes the bottle and the means by which it was sealed at the top with adhesive. She was told that the specimen was blood of the late Arthur Earnshaw, and she proceeded with the test on the same day as she received the specimen. It may be noted too that no effort was made on cross-examination to attack or destroy this chain of identification.

There is nothing in the record to indicate that the learned trial judge misdirected himself on the question of onus, but, on the contrary, he appears to me to have fully appreciated the burden of proof resting on the defendant. He resisted, so far as he could properly do so, a finding of intoxication on the part of the deceased. He was reluctantly forced by the evidence to that conclusion. In my view there are no sufficient reasons on appeal in this case to disturb the finding of fact made by the trial judge, and it should, therefore, be confirmed: *Home Insurance Company of New York et al. v. Lindal and Beattie*, [1934] S.C.R. 33 at 36, [1934] 1 D.L.R. 497.

I proceed to consider the effect in law of the intoxication of the insured on the rights of the parties. Two questions arise: (1) What is the proper construction of clause 12 of the policy

of insurance? (2) Should the Court refuse to enforce the contract of insurance on the ground of public policy?

It is argued that clause 12 is an addition to the statutory conditions, and that because it is not authenticated in the manner prescribed by law, the defendant cannot rely on its provisions. An examination of the statutory conditions made part of the contract of insurance shows each subject dealt with under separate paragraphs. The variations in the conditions are also set forth. But there is no subject to which the provisions of clause 12 are in any way relevant or applicable: *The Continental Casualty Company v. Casey*, [1934] S.C.R. 54 at 64, [1934] 1 D.L.R. 577. There is no similarity in character to any statutory condition. The provisions of clause 12 are not supplemental, auxiliary, accessory or additive to the statutory conditions. On the contrary, they are completely independent, and merely limit the risk undertaken by the insurer. "Bodily injuries" as described in the policy are confined to those sustained "solely through external, violent and accidental means," and the insurer agrees to pay specified amounts subject to the provisions, conditions and limitations set forth in respect of injuries resulting from an "accident". In case of death by accident the insurer agrees to pay the amount of insurance to the named beneficiary. Clause 12 constitutes a definition in negative form of the word "accident". *Inter alia*, it particularizes one kind of accident, injury or disability, *viz.*, "accident, injury, disability . . . caused directly or indirectly, wholly or partly by . . . intoxication"; it expressly excludes that class from the meaning of the words previously used in the policy to describe the risk assumed by the insurer. In my opinion the provisions qualify and restrict the peril insured against, and not the circumstances in which the risk attaches or continues. See *Curtis's and Harvey (Canada), Limited v. North British and Mercantile Insurance Company, Limited*, [1921] 1 A.C. 303, 55 D.L.R. 95, [1921] 1 W.W.R. 389; and also for distinction, *The W. Malcolm Mackay Company v. The British America Assurance Company*, [1923] S.C.R. 335, per Anglin J. at p. 350, [1923] 2 D.L.R. 506, and *Fidelity-Phenix Fire Insurance Company of New York v. McPherson et al.*, [1924] S.C.R. 666, [1925] 1 D.L.R. 169. Furthermore, I think that, apart altogether from the provisions of clause 12, the bodily injuries resulting in death of the insured were not caused "solely through external, violent and accidental means".

The wrongful act of the deceased in driving his motor vehicle while in a state of intoxication cannot be termed "accidental". The injuries to the deceased were caused by such act, and are directly attributable, in whole or in part, to his misconduct.

Independently too of the provisions in clause 12, the plaintiff cannot enforce a claim for loss in the circumstances of this case, because it would, in my opinion, be contrary to public policy to permit her to do so. The insured was in a state of intoxication while in charge of a motor vehicle on a public highway. He ought not, in his lifetime, to find redress in the courts for any loss sustained by him as a result of such wrongdoing. His reckless disregard of the public safety, and his transgression on the rights of the public should be disapproved by the Court. It should not allow such public misbehaviour, directly or indirectly, to form the foundation of a right, nor enable a claim by such a wrong-doer to be enforced. The beneficiary under the policy can fare no better. She has no right beyond that possessed by the insured, and is subject to the same disabilities in law as he would be in his lifetime: *Beresford v. Royal Insurance Company, Limited*, [1938] A.C. 586. But in this case it appears clear to me that at the time of the accident the insured was guilty of an unlawful act under the provisions of s. 285 of The Criminal Code. Moreover, he must have known, or be presumed to have known, that his act was unlawful. No action for indemnity to him or his beneficiary can be maintained. In *Burrows v. Rhodes and Jameson*, [1899] 1 Q.B. 816, Kennedy J., at p. 828, says: " . . . if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void." At p. 833, he says: "As I have already pointed out, it can never, in my judgment, be successfully contended that a claim for indemnity can be maintained where the doer of an act knew at the time, or must be presumed to know, of circumstances which make the act either a private wrong or a public crime." See also *O'Hearn v. Yorkshire Insurance Co.* (1921), 51 O.L.R. 130, 67 D.L.R. 735; *Home Insurance Company of New York et al. v. Lindal and Beattie*, [1934] S.C.R. 33, [1934] 1 D.L.R. 497; *Ingles v. The Sun Assurance Co. of Canada*, [1937] O.R. 373, [1937] 1

D.L.R. 706, 4 I.L.R. 111; *Wesley v. The Toronto General Insurance Company*, [1939] O.W.N. 380, 511, 6 I.L.R. 142, 246.

The appeal should be dismissed with costs.

Appeal allowed with costs and judgment directed for plaintiff with costs, LAIDLAW J.A. dissenting.

Solicitors for the plaintiff, appellant: Lamport, Ferguson & Co., Toronto.

Solicitors for the defendant, respondent: Phelan, Richardson, O'Brien & Phelan, Toronto.

[HOPE J.]

Bank of Montreal v. Bailey and Bailey.

Limitation of Actions—Judgments—Not Barred, as Specialties, within Twenty Years—Inapplicability of The Limitations Act, R.S.O. 1937, c. 118, s. 48(1)(b)—Discretion of Court in Case of Laches.

A judgment in Ontario is not a specialty, and a proceeding to enforce that judgment is not barred, under s. 48(1)(b) of The Limitations Act, in twenty years. *Thompson v. Donlands Properties Ltd. et al.*, [1934] O.R. 541, must be followed in this respect rather than *Doel v. Kerr* (1915), 34 O.L.R. 251, and the earlier decisions. Nevertheless, the equitable principle of laches is not affected, and the Court may refuse leave to proceed upon a judgment more than twenty years old, if there has been great delay, for which no satisfactory explanation is offered. *Harris v. Lindeborg et al.*, [1931] S.C.R. 235, applied.

Practice—Filing Affidavits before Hearing of Motion—Relief against Default—When Relief to be Refused—Rules 184, 298.

Although non-compliance with Rule 298, requiring the filing of affidavits before the hearing of a motion, may be relieved against under Rule 184, such relief should not be granted where the effect will be to deprive the defendant of a legal or equitable defence. *Re Town of Toronto Junction and Toronto R.W. Co.*; *Re Greenwood* (1908), 11 O.W.R. 182; *Ellis v. Pelton*, [1933] O.W.N. 191, applied.

AN appeal by the defendants from the order of the Local Judge at Brantford giving leave to issue execution upon a judgment dated 23rd March 1923. The facts are fully stated in the judgment.

27th April and 21st May 1943. The appeal was heard by HOPE J. in Chambers at Toronto.

J. R. Cartwright, K.C., for the defendants, appellants.

J. Grayson Smith, K.C., and *J. A. D. Slemm, K.C.*, for the plaintiff, respondent.

31st May 1943. HOPE J.:—The history of the action itself and the subsequent proceedings, including the proceedings which led to the granting of the order by the Local Judge at Brantford on 5th April, must be noted.

By writ issued at Brantford on 26th February 1923, the plaintiff sued the two defendants on two certain promissory notes, each dated 27th October 1922, for \$1000 and \$2000 respectively, on which there was then owing a balance, inclusive of interest, of \$3033.46. There being no appearance entered, default judgment was signed on 23rd March 1923.

Concurrent writs of *fi. fa.* were shortly thereafter issued to the respective sheriffs of the counties of Brant, Wentworth and York. Nothing was realized upon the said writs of *fi. fa.*, and the executions expired in due course in 1926 and were not, in the interval, renewed.

It is stated that the defendant H. H. Bailey was absent from Canada for a period of approximately five years, commencing in 1924 and continuing until 1929. It would appear, however, that the female defendant had, at all times, been in Canada, and that the male defendant has been in Canada continuously since 1929. There is no suggestion of any payment or acknowledgment having been made upon the judgment at any time since it was originally signed in 1923.

Twenty years from the date of the judgment would have expired on Tuesday, 23rd March 1943. On Saturday, 20th March, the plaintiff's solicitors by telephone secured leave from the Local Judge to serve a short notice of motion returnable before him on Monday, 22nd March. The notice of motion served accordingly, while reciting that it was a short notice by special leave, made no reference to the official from whom the special leave had been obtained. No affidavits upon which the notice of motion was founded were filed before the service of the notice of motion, and in fact none of the affidavits which were used was filed until after the date of the order of the Local Judge, namely, 5th April 1943. It is quite clear that no one affidavit was in fact filed with the Local Registrar at Brantford until 9th April, and then only pursuant to an order of the Local Judge, dated the 9th day of April, directing that the affidavit of Albert S. Maxwell, sworn as of the 20th March 1943, the affidavit of William T. Hall, sworn on 22nd March 1943, and a further affidavit of the said Maxwell, sworn as of 7th April 1943, be respec-

tively filed *nunc pro tunc* as of the respective dates on which each of the three affidavits was sworn.

On the return of the notice of motion before the Local Judge on 22nd March, the solicitor for the defendants appeared, stating that he appeared merely as a matter of courtesy to the Court, but that he was unable to show cause with regard to the motion in view of the fact that proper notice of motion had not been served in the matter, and further stating that he objected to the jurisdiction of the Court to hear the motion without proper notice having been given to the defendants. It would appear that the Local Judge then stated that he was not prepared to hear the motion due to the defendants' solicitor's objection. The solicitor then left the judge's chambers.

Subsequently, on 23rd March, the defendants' solicitor received a telephone call from the plaintiff's solicitor, confirmed by letter of the same date, a copy of which was filed, stating that the motion in question had been adjourned by the Local Judge to Monday, 29th March, at the same hour and place.

The defendants' solicitor did not again appear on the motion, which was further adjourned from 29th March to 5th April.

Irregularities in compliance with Rule 298 may be relieved against by the Court under the provisions of Rule 184, but such relief should not be granted where to grant the same would deprive a defendant of a legal or equitable defence (*vide Re Town of Toronto Junction and Toronto R.W. Co.; Re Greenwood* (1908), 11 O.W.R. 182 and *Ellis v. Pelton*, [1933] O.W.N. 191).

Counsel for the defendants relied on the Statute of Limitations as a bar to the proceedings now permitted by the order of the Local Judge, who apparently felt bound to follow the judgment of the Court of Appeal in *Thompson v. Donlands Properties Ltd. et al.*, [1934] O.R. 541, [1934] 4 D.L.R. 234. The application of the Statute of Limitations as a bar to any proceeding on a judgment dormant for twenty years was long considered to be the law in the Province of Ontario, as is evidenced by a long series of decisions commencing with *Boice v. O'Loane* (1878), 3 O.A.R. 167, reversing 28 U.C.C.P. 506, and continued through the following cases: *McMahon v. Spencer* (1886), 13 O.A.R. 430; *Mason v. Johnston* (1893), 20 O.A.R. 412; *McCullough v. Sykes et al.* (1885), 11 P.R. 337; *Allison*

v. Breen (1900), 19 P.R. 119, 143; *Butler v. McMicken* (1900), 32 O.R. 422 and *Price v. Wade* (1891), 14 P.R. 351.

It was considered that a judgment, being a specialty, fell within the provisions of the Statute of Limitations. This statement of the law, namely, that a judgment is a specialty, is enunciated in an article to be found in 6 C.E.D. (Ont.) at p. 417. Also, in *Weaver on Limitations* published in 1939, the author says, at p. 301: "An action upon a judgment is barred, as specialty in twenty years in Ontario", citing *Allison v. Breen, supra*. However, in the case of *Thompson v. Donlands, supra*, (which is also reviewed in *Weaver on Limitations*) the learned Justices in Appeal, after a very exhaustive analysis of the development of the law with respect thereto, laid down that an action to enforce the payment of a judgment is not an action on a specialty and that the Ontario Statute of Limitations does not limit the time for bringing an action to recover a sum of money secured by a judgment.

It is of interest to note, however, that contrary to the last cited decision of the learned Justices of Appeal, which points out the difference between the Ontario and the English Acts, it is stated in Halsbury's Laws of England, 2nd ed., vol. 14, p. 8, in the last sentence of para. 10: "Judgments and orders are specialties". The Limitations Act, R.S.O. 1937, c. 118, s. 48 (1) (b), expressly refers to and is applicable to specialties.

Strange as it may appear, the argument and the judgments in *Thompson v. Donlands* make no reference to an earlier decision of the Court of Appeal of Ontario in which it was held that the Statute of Limitations fixes the period within which a judgment creditor can in any way enforce his judgment at twenty years from the date of the judgment. That case, *Doel v. Kerr* (1915), 34 O.L.R. 251, 25 D.L.R. 577, was a judgment of Middleton J., unanimously affirmed on appeal by a Court consisting of Meredith C.J.O. and Garrow, Maclaren, Magee and Hodgins JJ.A. Had the *Doel* case been referred to in *Thompson v. Donlands*, I would be forced to conclude that the Court in the latter case acted upon the rule laid down in *Stuart v. The Bank of Montreal et al.* (1909), 41 S.C.R. 516, namely, that only in very exceptional circumstances should a Provincial Court of Appeal in any Province where the basis of law is the common law of England, feel at liberty to depart from one of its own previous decisions if it is clear that it was not the result of

some mere slip or inadvertence. The Ontario Judicature Act formerly provided (R.S.O. 1927, c. 88, s. 31(1)) that "The decision of a Divisional Court on a question of law or practice unless overruled or otherwise impugned by a higher court shall be binding on all Divisional Courts and on all other courts and judges and shall not be departed from in subsequent cases without the concurrence of the judges who gave the decision." While this specific provision has now been dropped from The Judicature Act, R.S.O. 1937, c. 100, nevertheless it still remains, as has been frequently stated, a prevailing rule.

As is pointed out in *Fisken et al. v. Meehan* (1876), 40 U.C. Q.B. 146, it is the duty of a subordinate court to give full effect to the decisions of a Court of Appeal whatever may be its own views as to their wisdom, but when the appellate court departs from its own decision and leaves it uncertain what its views are on a question of law, it is the duty of a subordinate court to give effect to the latest expression of the views of the appellate court, leaving it to that court to determine which is the sounder, the earlier or the later decision. With this proposition I must abide, and I am compelled to hold that the rule as enunciated in *Thompson v. Donlands* must now be followed.

It might here, however, be observed that despite the express views of the Court in the last-named case as to the application of The Limitations Act, there was clear evidence, accepted by the trial judge and also by the Court of Appeal, that there had been acknowledgments or payments made within the twenty-year period, which would, in any event, have taken the facts of that particular case out of The Limitations Act, should the same be held to apply.

After a careful perusal of *Thompson v. Donlands*, I am unable to find that the branch of the judgment dealing with The Limitations Act was purely *obiter dictum*. It would appear that the Court there rested its decision on two different grounds, either of which, in its opinion, was sufficient to support the decision. Hence it cannot be said that the decision as to the applicability of The Limitations Act is *obiter*. In *Stuart v. Bank of Montreal*, *supra*, it is stated that it is impossible to treat a proposition which the Court declares to be a distinct and sufficient ground for its decision as a mere dictum, merely because there is another ground upon which, standing alone, the case might have been determined. Otherwise, in the light of the continued con-

sistency of earlier judgments to the contrary, and of the evidence of payments and acknowledgments taking it out of the statute, I would have considered as purely *obiter* the *Thompson v. Donlands* decision as to judgments not being specialties.

While declaring that The Limitations Act does not render the judgment effete, Riddell J.A. stated: "This is, of course, not to modify the equitable doctrine of laches, if it is applicable." In view of the circumstances of the case then under consideration, the learned Justices of Appeal did not consider laches applicable. However, the circumstances in the case at bar are vastly different. There is no suggestion of any acknowledgment or payment whatsoever during the last twenty years, and, as stated by Davis J.A. in his dissenting judgment in *Thompson v. Donlands* case: "... justice requires that when a plaintiff has delayed many years, his suit shall be looked upon with suspicion. Where no Statute applied, both Courts of common law and Courts of equity have supplied the want by creating rules of limitation. As early as 1767, Lord Camden L.C. in *Smith v. Clay*, 3 Bro. C.C. 639n, 29 E.R. 743 (note 2), said that a Court of equity had always refused its aid to stale demands where a party has slept upon his right and acquiesced for a great length of time. 'Nothing can call forth this Court into activity, but *conscience, good faith and reasonable diligence*; where these are wanting the Court is *passive* and does nothing'."

In *Harris v. Lindeborg et al.*, [1931] S.C.R. 235, [1931] 1 D.L.R. 945, it was said that, in applying the doctrine of laches, it is always a question dependent upon the degree of diligence which might reasonably be required and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. It is also recognized that delay which would otherwise bar the plaintiff from relief may be excused if it is explained. In the present case the only excuse offered in the material filed by the plaintiff is that one of the defendants was out of Canada approximately from 1924 till 1929. The other defendant, however, would appear to have been in Canada at all times and the one-time absent defendant has been continuously available from 1929 to the present.

In *Thompson v. Donlands*, at p. 554, the learned dissenting justice stated: "Upon the facts and circumstances of this case I think the plaintiff, to obtain relief in equity, was bound 'to

shew to demonstration that the judgment has not been satisfied' as per Baron Alderson in *Grenfell v. Girdlestone* (1837), 2 Y. & C. Ex. 662 [160 E.R. 560] at pp. 681 and 682".

This enunciation of the law with respect to laches is in no way derogated from by the fact that it appears in the dissenting judgment, this aspect of the case not having been relied upon, apparently, in the majority judgment.

In the case at bar I am of the opinion that, assuming that no irregularities existed in connection with the motion brought before the Local Judge, the plaintiff has failed to show to demonstration that the judgment has not been satisfied. The material ultimately filed could not be considered as going to this length. While there is no rule in equity fixing a specific time within which the doctrine of laches will operate, the courts of equity in England have generally refused to grant equitable relief after a delay of twenty years. I am of the opinion that the learned Local Judge was entitled to give effect to such equitable doctrine of laches, as is clearly contemplated by the *Thompson v. Donlands* decision, despite the fact that he apparently considered himself bound by that decision, in his freedom to apply The Limitations Act.

Where so many irregularities have occurred in this application to the Local Judge as herein earlier enumerated, I am also of the opinion that relief should not be granted against such irregularities under Rule 184. The *ex parte* order of the Local Judge permitting the affidavits to be filed *nunc pro tunc* was not served on the defendants. On this motion the counsel for the defendants asked leave to appeal therefrom. Such leave should be granted and also the order permitting the filing *nunc pro tunc* should be set aside. Therefore I come to the conclusion that the appeal must succeed, and the order of the learned Local Judge granting leave to issue execution on the 1923 judgment must be set aside, with costs to the defendants.

Order accordingly.

Solicitors for the plaintiff, respondent: Harley, Sweet & Slemm, Brantford.

Solicitors for the defendant, appellant: Trepanier & Hagey, Brantford.

[ROACH J.]

Mills v. Mills.

Divorce and Matrimonial Causes—Action for Nullity, Based on Allegation of Previous Subsisting Marriage—Burden of Proof—Presumptions.

In an action for a declaration of nullity, based upon an allegation that the defendant, at the time of the alleged marriage, was already married, the onus is upon the plaintiff to establish the subsistence of the first marriage. If the evidence, although not strong enough to raise a presumption of the death of the first spouse, is equally consistent with his death or with his continued life, this onus is not satisfied, and the action must be dismissed.

Evidence—Presumptions—Death or Continuance of Life—Validity of Marriage.

While there is no presumption of law as to the continuance of life, an inference of fact may legitimately be drawn that a person alive and in good health at a particular time was alive a short time afterwards. Phipson on Evidence, 8th ed., p. 98, applied. Discussion of the circumstances giving rise to a presumption of death after seven years' unexplained absence, and of the evidence required to raise such a presumption.

AN action by a husband for a declaration of nullity of marriage. The facts are fully stated in the judgment.

7th May 1943. The action was tried by ROACH J. without a jury at Toronto.

D. J. Nickle, for the plaintiff.

L. W. Mitchell, for the defendant.

3rd June 1943. ROACH J.:—The plaintiff and the defendant went through a form of marriage at Toronto on the 25th day of November, 1935.

The defendant was previously married to one Beadle in London, England, on 23rd April 1902. In this action the plaintiff alleges that this former marriage had not been dissolved and was a valid and subsisting marriage at the date of his alleged marriage to the defendant, and on that account claims that his marriage to her is null and void.

At the trial the plaintiff made no attempt to prove by positive evidence that as a fact Beadle was living on 25th November 1935. His counsel urged in argument that the plaintiff had satisfied the onus which rested on him by proving the previous marriage; that once it was proved its continuance was presumed until its dissolution was proved. It could be dissolved by either the death of Beadle or by a decree of a court of competent jurisdiction. The plaintiff sought to prove neither of these

events. The sole question for determination therefore is the question of the burden of proof.

Following the defendant's marriage to Beadle, she resided with him in London, England, and two children were born of that marriage. There were periods when due to disagreements they lived separate from one another and in January 1922 she finally left him and came at once to Canada. At the trial the defendant stated that when she left Beadle she had decided that she wanted nothing more to do with him, and in order that he might not be able to trace her, she left a note containing the misleading information that she was going to Devonshire, and she and her daughter came to Canada under an assumed name, namely her mother's maiden name. She retained this assumed name in Canada until her alleged marriage to the plaintiff, and her daughter continued to use that assumed name.

Various presumptions of law and of fact must be applied in their proper order in considering the question which here arises.

First is the presumption of law that the marriage of the parties to this action was a valid marriage.

Secondly, the marriage of the defendant to Beadle is presumed to have been a valid marriage.

Thirdly, Beadle having been alive in 1922, a presumption, or more accurately an inference, may or may not arise that he was alive on 25th November 1935, depending on the evidence.

Dealing with this third presumption, it is stated in Phipson on Evidence 8th ed., p. 98, citing *In re Phené's Trusts* (1870), L.R. 5 Ch. 139 and *Reg. v. Lumley* (1869), L.R. 1 C.C. 196, that while there is no presumption of law as to the continuance of life, an inference of fact may legitimately be drawn that a person alive and in health at a certain time was alive a short time after. When that inference may be displaced by the lapse of time and other events has been the subject of consideration both in the courts in England and in our own courts.

In *Reg. v. Willshire* (1881), 6 Q.B.D. 366, the question of the validity of a marriage celebrated in 1879 arose on a charge against the prisoner of having gone through a bigamous marriage in 1880. Lord Coleridge C.J. agreed with the contention that there was a presumption that the marriage of 1879 was valid "but the prisoner showed that there was a valid marriage in 1864, and that the woman he then married was alive in 1868. He thus set up the existence of a life in 1868, which, in

the absence of any evidence to the contrary will be presumed to have continued to 1879."

Ivett v. Ivett (1930), 143 L.T. 680, was a case in which the respondent had married the appellant in February 1930. She had previously married one Holland in 1919, and had not seen him since 1922 or 1923, and there was no evidence that Holland was dead. It was held that the justices who had made an order for maintenance against the appellant had erred, and that the onus rested upon the respondent of proving that she was the wife of the appellant, that is to say, of proving that the marriage to Holland had been dissolved.

Reg. v. Curgerwen (1865), L.R. 1 C.C. 1, 10 Cox C.C. 152, was a case in which it was proved on an indictment for bigamy that the prisoner and his wife had been living apart for seven years preceding the second marriage and having regard to the circumstances it was equally probable that he did not know as that he did know that his wife was living at the time of the second marriage. It was held that the onus was on the prosecution to prove that he did know the fact.

In *Reg. v. Jones* (1883), 15 Cox C.C. 284, it was proved that the accused and his wife married in 1865 and had lived together after marriage, but how long did not appear. There was no evidence of separation or when they last saw each other. In 1882 the accused married a second time and was indicted for and convicted of bigamy. Lord Coleridge C.J., after reviewing the evidence, said: "There is nothing, therefore, stated in the case to displace the presumption that the first wife was still alive". He then referred to the evidence in *Reg. v. Curgerwen*, *supra*, that the accused and his first wife had lived apart for seven years preceding the second marriage, and continued: "In the present case there was no such evidence forthcoming, and, therefore, a state of things once set up must be presumed to continue unless there is evidence to displace that presumption."

In our own courts, the case of *McCullough v. Ralph*, [1942] O.W.N. 80, [1942] 2 D.L.R. 389, was an undefended action in which the plaintiff husband sought a declaration that a marriage ceremony performed in July 1921 was a nullity because the defendant wife had been married in 1917. The defendant stated that her husband had gone overseas in 1918 with the Canadian military forces shortly after the marriage, but had not communicated with her since July 1918, that since that time

she had received no word as to his whereabouts, or as to whether he was living or dead, and that she did not know at the time of the trial whether he was living or dead. The learned trial judge granted the declaration of nullity "in the absence of evidence" that the first husband was dead.

Another case in our own courts having a different termination is *Bates v. Bates*, [1937] O.W.N. 635. That was a defended action in which the facts were as follows: the defendant, the wife, had married one English, in Ireland, and the couple emigrated to Canada and shortly afterwards moved to Detroit, Michigan. They separated in 1921 and the husband returned to Ireland in 1922. The wife stated at the trial that in 1923 she had information that her husband was killed in "some rebellion". She married the plaintiff in 1925 at Detroit, and with him moved to Windsor immediately thereafter, establishing a domicile in Ontario. The learned trial judge dismissed the plaintiff's (the husband's) claim for a declaration of nullity, saying: "There is no way of concluding from the evidence whether the defendant was a widow or not at the time of her marriage to the plaintiff".

In the case at bar there were additional facts appearing in evidence which must be considered.

The defendant has not had any communication from Beadle since she left him in 1922. In view of the misleading information which she gave at the time of her departure and the fact that she came to Canada under an assumed name it would be rather surprising if she had heard from him. When she left him he was a member of the British permanent army. He had close relatives living in England including a sister resident in London.

In 1929 the parties to this action were contemplating marriage, and in that year the defendant made some inquiries concerning Beadle. She wrote to the War Office in London and received a reply that they had no knowledge or record of him. In September 1929 she inserted three advertisements in a Toronto daily newspaper asking for any information concerning him, and received no reply. To my mind this cannot be regarded as a very effective or well-chosen channel through which to seek information concerning her husband whom she had last heard of in England in 1922, and the significance of the fact that it elicited no information cannot be very compelling. In

1942 she cabled Beadle's sister in London as follows: "Hearing Ted died I remarried November Thirty-five. If wrong advise." She received a reply as follows:—"Not seen Ted since 1927, writing." The defendant did not at the trial state that she had heard that Beadle had died, and her failure so to state, if it was a fact, leads to the inference that she had not received such information. In 1937 the defendant's sister returned from Canada to London accompanied by her (the sister's) daughter. The daughter gave evidence at the trial that she was present on occasions when her mother made inquiries as to Beadle. Where she inquired and from whom does not appear in evidence and all that does appear from her evidence is that those inquiries did not result in Beadle being found.

The law as to the presumption of death has been stated as follows:—"A person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death."

Apart from the information obtained from Beadle's sister the other evidence does not lead to any compelling inference. Even the sister's cablegram is open to criticism. In it she simply says that she has not "seen" Ted since 1927. If she meant thereby to convey the information that she had not heard of him since 1927 she certainly used inapt language. All that evidence, while not sufficient to raise a presumption of death, has, in my opinion, this value, that when added to the evidence as to the lapse of time since the defendant left Beadle, even in the circumstances which I have related, the whole puts upon the plaintiff husband the burden of proving that Beadle was alive on the date when the plaintiff went through the form of marriage with the defendant; in other words, while not sufficient to raise a new presumption it is sufficient to make it equally probable that the earlier marriage was not subsisting at the relevant date as that it was. That being so, the plaintiff fails to prove his case.

One cannot have much sympathy for the plaintiff. I am satisfied on the evidence that he went through the form of marriage with the defendant having at the time as much knowledge as to the defendant's marital status as she had. Notwithstanding this knowledge if he proved his case he would be

entitled *ex debito justitiae* to the decree he now seeks. See *Bateman v. Bateman* (otherwise *Harrison*) (1898), 78 L.T. 472.

The action is dismissed with costs.

Action dismissed with costs.

Solicitor for the plaintiff: J. L. Cohen, Toronto.

Solicitor for the defendant: George W. Gardhouse, Toronto.

[ROACH J.]

[COURT OF APPEAL.]

D'Alessandro et al. v. Minden.

Motor Vehicles—Liability of Owner for Negligence of Others—Who is a “Chauffeur”—The Highway Traffic Act, R.S.O. 1937, c. 288, ss. 1(a), 47(1)—Collector Permitted to Use Employer’s Automobile.

Where an employee, whose duties include both acting as a clerk in his employer’s shop and making collections from customers, is provided with an automobile for use in collecting, he is not a “chauffeur” within the meaning of s. 47(1) of The Highway Traffic Act. If, therefore, he takes his employer’s automobile, without the owner’s consent, for his own purposes, and injures another person by negligent driving, the employer cannot be made liable in damages to the person so injured, since the clerk was obviously not acting within the scope of his employment, and the special statutory liability contemplated by s. 47(1) does not arise.

Per Kellock J.A.: Whether or not the employee is to be regarded as a chauffeur *qua* the car provided for his own use, he is clearly not a chauffeur *qua* a car provided for a fellow employee, which the first employee has no right to use.

AN action for damages for personal injuries. The facts are fully stated in the judgments.

3rd, 4th, 5th February 1943. The action was tried by ROACH J. without a jury at Hamilton.

O. M. Walsh, K.C., for the plaintiffs.

L. W. Gay, K.C., for the defendant.

22nd February 1943. ROACH J.:—This is an action to recover damages as the result of a collision between an automobile owned by the plaintiffs Frank and Armand D'Alessandro and driven by the plaintiff Massi and an automobile owned by the defendant.

At the opening of the trial counsel for the defendant made the formal admission that the collision was due solely to the negligence of the driver of the defendant’s car. It is pleaded by the defendant that the driver of the defendant’s car was in possession of it at the time of the collision without the owner’s consent.

The defendant is the proprietor of a retail credit jewellery business in the city of Hamilton. Early in the fall of 1941 he employed one Livingstone to work as a clerk in his store. Early in 1942 the scope of Livingstone's employment was changed and from that time forward he worked part of his time in the defendant's store and during the rest of the time he was required to make collections from customers indebted to the defendant. To facilitate this work of collecting, the defendant supplied one of his automobiles, which Livingstone drove in and about the city of Hamilton and the surrounding country, calling at the homes of the defendant's debtors to collect due instalments on accounts owing. On the days or part days set aside for collections, the defendant's credit manager would give Livingstone a number of debtors' cards showing the address of each debtor and the amount of the instalment due, and it was Livingstone's duty to call at the home of each of these debtors and try to effect collection. For all his duties Livingstone was paid a straight salary, and he was not required to do any collecting at night. The defendant had another employee doing similar work, and for his use therein the defendant supplied another automobile. Both these automobiles were kept in a public garage, and each employee was instructed by the defendant to place the automobile allotted to him in the garage at the end of the day's work, and it was to be left there until next required by the employee to resume his collections. In violation of these instructions, Livingstone, on the night of the collision, took the defendant's automobile—not the one allotted to him but the one allotted to his fellow employee—out of the garage on an escapade of his own, not at all connected with his employer's business, and while he was on this escapade the collision occurred.

There is no doubt about it, and I find as a fact that at the time of the collision Livingstone had possession of the automobile without the consent, express or implied, of the defendant, and contrary to the defendant's general instructions.

The plaintiff's counsel argued that Livingstone was the defendant's chauffeur, and that the automobile was in Livingstone's possession as such chauffeur, in which event the fact that Livingstone had it without the consent of the owner would be immaterial.

S. 47(1) of The Highway Traffic Act, R.S.O. 1937, c. 288, provides as follows:

"The owner of a motor vehicle shall be liable for loss or damage sustained by any person by reason of negligence in the operation of such motor vehicle on a highway unless such motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur".

S. 1(a) declares that "'Chauffeur' shall mean any person who operates a motor vehicle and receives compensation therefor".

In my opinion Livingstone was not a "chauffeur" within the meaning of the Act. The compensation by way of salary was paid to him for his services *qua* clerk in the defendant's store and *qua* collector, and the operating of the defendant's automobile was merely incidental to his duties as a collector.

The same point arose in a case in the Province of Saskatchewan, *Rex ex rel. Armstrong v. Preston*, [1931] 3 W.W.R. 505. Under The Vehicles Act of that Province, "chauffeur" was defined as "a person operating a motor vehicle for hire, or an employee hired or engaged for the purpose of operating a motor vehicle" and it was held that the definition did not include a person employed for the main purpose of doing work other than driving a motor car but which incidentally required him to drive a car part of the time; especially if at the time he is charged with driving a motor car without having a chauffeur's licence he was not driving it on his employer's business but for his own purposes.

Livingstone not being a chauffeur, and having had possession of the car without the owner's consent, no liability attaches to the owner, and therefore the action fails and must be dismissed with costs.

In case this judgment should come under review in a higher court, I assess the damages as follows:

To the plaintiffs Frank and Armand D'Alessandro the sum of	\$1,200.00
To the plaintiff Mimmi Massi	300.00

Action dismissed with costs.

11th May 1943. The appeal was heard by RIDDELL, FISHER and KELLOCK JJ.A.

O. M. Walsh, K.C., for the plaintiffs, appellants.

E. L. Haines, for the defendant, respondent.

8th June 1943. RIDDELL J.A.:—This is an appeal from the judgment of Mr. Justice Roach; the facts are simple and not, substantially at least, in dispute.

These facts are set out in detail in the careful reasons for judgment of the trial judge; it seems necessary to detail a few of them.

The defendant is a jeweller, with a business, a retail business, in Hamilton; the offender Livingstone, after a short term as a clerk, was recently entrusted with the collection of accounts during part of his time. To help him in his work, the defendant gave him the use of a particular car. This he was to use in going to the residences of debtors. On the days on which he was to act as collector, he was given, by the manager, a list of the debtors whom he was to visit to effect payment of instalments due. In this duty, he had the use of a particular car.

There was another employee who had similar duties, and in them the use of another car; with this, the culprit had nothing to do.

When not in use, the cars were stored in a garage, and the employees were instructed to leave the cars there until they were required for collection purposes.

One evening, Livingstone, for purposes of his own, and in no way connected with the business of the defendant, in disregard of the instructions, without the defendant's consent or knowledge, and contrary to his express instructions, took out from the garage, not his own car, but the car of the other clerk, with which he had nothing to do.

Going along the highway, by his negligence, he caused serious damage to the plaintiffs.

On an action brought, by those so injured—Livingstone, unfortunately, was killed—it was admitted that the negligence of Livingstone was the sole cause of the accident; but the defendant denied liability for such negligence.

Were it not for the provisions of our statute, there could be no pretence that the defendant was liable for the consequences of the negligence; but the plaintiffs rely upon statute law to establish their claim.

S. 47(1) of The Highway Traffic Act, R.S.O. 1937, c. 288, which is relied on by the plaintiffs, provides as follows:

"The owner of a motor vehicle shall be liable for loss or damage sustained by any person by reason of negligence in the operation of such motor vehicle on a highway unless such motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur . . ."

S. 1(a) declares that "'chauffeur' shall mean any person who operates a motor vehicle and receives compensation therefor."

In my opinion, Livingstone was not a "chauffeur" within the meaning of the Act. The compensation by way of salary was paid to him for his services *qua* clerk in the defendant's store and *qua* collector, and the operating of the defendant's automobile was merely incidental to his duties as a collector.

The same point arose in a case in the Province of Saskatchewan, *Rex ex rel. Armstrong v. Preston*, [1931] 3 W.W.R. 505. Under The Vehicles Act of that Province, "chauffeur" was defined as "a person operating a motor vehicle for hire, or an employee hired or engaged for the purpose of operating a motor vehicle" and it was held that the definition did not include a person employed for the main purpose of doing work other than driving a motor car but which incidentally required him to drive a car part of the time; especially if at the time he is charged with driving a motor car without having a chauffeur's license he was not driving it on his employer's business but for his own purpose.

This conclusion is strengthened by the fact that Livingstone was not using the car furnished him for his use in his master's business, but another car which he had no right to take—he was a mere trespasser, taking possession of the car of another, and doing damage with it.

I think the appeal should be dismissed with costs.

FISHER J.A.:—At the trial it was admitted by counsel for the respondent that the driver of the automobile—Livingstone—was negligent in causing the accident. The learned judge, Roach J., was of the opinion, and found, that "Livingstone not being a chauffeur and having had possession of the car without the owner's consent, no liability attached to the owner, the respondent, and therefore the action fails and must be dismissed with costs."

This appeal followed, and the only question for determination is whether Livingstone was a chauffeur and had posses-

sion of the motor vehicle at the time of the accident, and was operating it, in his capacity as a chauffeur of the respondent.

S. 1(a) of The Highway Traffic Act, R.S.O. c. 288, declares that " 'Chauffeur' shall mean any person who operates a motor vehicle and receives compensation therefor".

Shortly, the relevant facts are: The respondent carried on a retail jewellery business and Livingstone was employed and acted as one of his clerks, and subsequently his employment was changed and thereafter he acted as a part-time clerk in the shop and the remainder of his time was employed in the collection from customers of the respondent who had purchased goods on the instalment plan. During that part of the time when Livingstone was engaged in making collections, the respondent provided him with a Studebaker car for the purpose of making collections at the homes of the respondent's customers. Livingstone's duties in the shop ceased at 6 p.m., and when out collecting he was to return as close as possible to 6 p.m., and upon his return his instructions were to put the car in a public garage where the respondent's cars were kept. The respondent paid for the storage of Livingstone's car and also the cost of its operation when he was making collections. According to the evidence, Livingstone was not to make collections after he returned at about 6 p.m., and he was forbidden to take the car out of the garage after that time. Livingstone was paid a fixed salary for his services.

At about 11 p.m. on 5th June 1942, Livingstone went to the garage, and, unknown to the respondent, took out a car (a Dodge) also owned by the respondent, which was used by another employee named Silver in making collections, and which Livingstone had no right to take. Livingstone then picked up two friends, a Miss Meakins and a young man named Wills, and undertook to drive them to their homes at Hamilton Beach, and whilst driving to the Meakins' home he collided with a motor vehicle owned by the appellants D'Alessandro and driven by the appellant Massi, the collision causing damage to the appellant's car and causing Livingstone's death.

For the appellant, it was argued before this Court that Livingstone was at the time of the accident in possession of the motor vehicle and operating it as the respondent's chauffeur, and that it made no difference whether Livingstone had the car in his possession without the respondent's consent.

It is, in my view, idle, on the facts disclosed, to argue that Livingstone was out in the ordinary course of his employment making collections or selling jewellery at about midnight on the 5th June, or that he had the respondent's consent to operate the car at the time of the accident. Livingstone was, as stated, a salaried employee of the respondent, and it was for his duties as a clerk and in making collections that he received compensation, and beyond question he was not operating this car as the defendant's chauffeur, or at the time of the accident doing anything that was incidental in his employment.

I fully agree with the reasoning and conclusion of the trial judge, and would dismiss the appeal with costs.

KELLOCK J.A.:—This is an appeal by the plaintiffs from a judgment of Roach J., dated 22nd February 1943, after a trial without a jury, by which the plaintiffs' action was dismissed.

The action was brought to recover damages sustained by the plaintiffs as the result of a collision between an automobile of the appellants and an automobile owned by the respondent. On behalf of the respondent it was admitted at the trial that the collision was due entirely to the negligence of one Roy Livingstone, the driver of the respondent's automobile. On behalf of the appellants it was contended that at the time of the collision the respondent's automobile was in the possession of Livingstone with the consent of the respondent, and that in any event Livingstone was the respondent's chauffeur within the meaning of s. 47(1) of The Highway Traffic Act, R.S.O. 1937, c. 288, and that, accordingly, the respondent was liable. The learned trial judge did not accept either of these contentions, and the action was dismissed.

The appellants on the appeal raised the same contentions as at the trial.

The evidence establishes that Livingstone at the time of the collision on 6th June 1942, was employed by the respondent as a clerk in one of the latter's retail jewellery stores in Hamilton and as a collector of accounts owing to the respondent in connection with that business. To enable Livingstone to perform his duties as a collector, the respondent supplied him with a Studebaker automobile belonging to the respondent, and for these duties Livingstone was paid a salary of \$14 per week.

At the time of the collision Livingstone was driving another car of the respondent, *viz.*, a Dodge, which another collector of the respondent used. The evidence is that Livingstone was not

entitled to use the Dodge car, and at the time of the collision was using it contrary to his employer's instructions.

The respondent provided a garage in which these cars were kept when not used for business purposes, and in which they were to be placed by Livingstone and the other collector, one Silver, at the end of the day, and they were not to be taken out at night. It appears that Livingstone had taken the Dodge car, used by Silver, out of this garage some time after nine o'clock on the evening in question and used it on a venture of his own. Some evidence was given on behalf of the appellants that Livingstone in fact had on occasion at night used the Dodge car to effect collections, but the respondent and his credit manager, one Pasis, gave evidence that they had no knowledge of any such use of either the Dodge or the Studebaker car, and that such use, if in fact it had taken place, was contrary to respondent's direct instructions. It appears that on one occasion about ten days prior to the collision in question, Livingstone had in fact taken this Dodge car from a service station, at night, and used it for his own purposes, and that the following morning Pasis had remonstrated with him.

The learned trial judge has found, as a fact that at the time of the collision Livingstone had possession of the Dodge car without the consent, express or implied, of the respondent, and with this finding I agree.

With respect to the contention of the appellants that Livingstone was the respondent's chauffeur and that the respondent was therefore liable by reason of s. 47(1), the learned trial judge held that Livingstone's salary was paid to him for his services *qua* clerk and *qua* collector; that the operating of the respondent's automobile by Livingstone was merely incidental to his duties as collector, and that that being so, Livingstone was not the respondent's chauffeur. The learned judge refers to the case *Rex ex rel. Armstrong v. Preston*, [1931] 3 W.W.R. 505.

By s. 1, clause (a) of The Highway Traffic Act, chauffeur is defined to mean "any person who operates a motor vehicle and receives compensation therefor". Mr. Walsh contends that Livingstone received compensation from the respondent for all the duties which he performed in the respondent's employ, one of which was the operation of one of the respondent's motor vehicles, and he argues that it is immaterial for the purposes of the definition whether the operation of the motor vehicle constitutes the whole of the employment or a part of it. He points

out that the statute under consideration in the *Armstrong* case included language not to be found in our statute.

Even if Mr. Walsh were right in this contention, there would still remain the question whether s. 47 would impose liability on the respondent in the circumstances of this case. In my opinion it would not. My view is that whether or not Livingstone could be said to be the chauffeur of the respondent with respect to the Studebaker car, he was not the chauffeur of the respondent with respect to the Dodge, which was the automobile involved in the collision. It is a person who operates "a" motor vehicle and receives compensation "therefor" which s. 1, clause (a) defines as a chauffeur. Livingstone did not receive any compensation, nor was he authorized in any way to operate the Dodge.

By s. 47(1) it is provided that the owner of "a" motor vehicle is liable for loss or damage sustained by reason of negligence in the operation of such motor vehicle unless "such" motor vehicle was without the consent of the owner in the possession of some person other than the owner or his chauffeur. This section is dealing with a particular motor vehicle, and the owner spoken of in the fifth line is the owner of "such" motor vehicle. To my mind, it is equally the chauffeur of "such" motor vehicle with whom that section is dealing. The section goes beyond the common law and is to be construed strictly. I do not think it is to be read as imposing liability upon the owner of an automobile with respect to which the driver was not the owner's chauffeur at all, and with respect to which he is as much a stranger as anyone else. So to hold is not, in my opinion, to read anything into s. 47(1) which is not there. Obviously, it is necessary to supply words describing the owner in the fifth line by referring back to the earlier part of the section. I think it is equally necessary to supply the same words with respect to the word "chauffeur" in the same line.

I do not think, therefore, that Livingstone, in the circumstances of this case, stood in the relation of chauffeur to the respondent with respect to the Dodge car. I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Walsh & Evans, Hamilton.

Solicitors for the defendant, respondent: Hazell & Gay, Hamilton.

[COURT OF APPEAL.]

The Commodore Grill v. The Town of Dunnville.

Municipal Corporations—Validity of By-laws—Licensing and Regulating Power—Whether Powers Separable—The Municipal Act, R.S.O. 1937, c. 266, s. 436(2).

A municipal by-law providing only for the licensing of "victualling houses", without any provision for regulating such houses or limiting their numbers, is a valid exercise of the municipality's powers, under s. 436(2) of The Municipal Act, to provide for "limiting the number of and licensing and regulating victualling houses", etc. The powers given under the subsection are separable, and it is not necessary that they should all be exercised. *Re Rex v. Cullian*, [1937] O.R. 922, considered and distinguished; *Re Harper and The City of St. Thomas*, [1939] O.R. 525, referred to.

AN appeal by the defendant from the judgment of Plaxton J., [1943] O.R. 142, [1943] 1 D.L.R. 530, declaring parts of a by-law invalid. The facts are fully stated in the judgments.

20th May 1943. The appeal was heard by ROBERTSON C.J.O. and HENDERSON and LAIDLAW JJ.A.

Fraser Raney, K.C., for the defendant, appellant: No issue of fact is disclosed in the pleadings, requiring a trial, and the proceedings should have been by originating notice. The respondents offered no evidence at the trial, except the documents, which were not disputed. The appellant's witnesses, who were members of the municipal council, merely deposed to the fact that the petition for a licence had been duly considered and refused, and the respondents offered no evidence in reply. The trial judge's decision is based entirely upon the invalidity of paras. 2 and 3 of the by-law, and this could have been determined on motion.

The trial judge based his decision mainly upon *Re Rex v. Cullian*, [1937] O.R. 922, [1937] 4 D.L.R. 670, which goes further than any previous case. All of the earlier cases are to the effect only that a municipality must be strictly confined within the limits of the authority conferred by the Legislature. We submit that a municipality is not required to do all that is authorized by The Municipal Act, or else not exercise the power at all, unless the effect of exercising only part of the powers authorized is manifestly to alter substantially the nature of the power granted. It is reasonable to allow the municipality to legislate freely within the ambit of its jurisdiction, provided it does not go beyond its powers: *Parsons v. City of London* (1911), 25 O.L.R. 172 at 179, 1 D.L.R. 756; *County of Norfolk v. Roberts*

(1913), 28 O.L.R. 593, 13 D.L.R. 463. The exercise of a power to license victualling houses, without exercising the ancillary powers conferred by s. 253 of The Municipal Act, R.S.O. 1914, c. 192, is not therefore *ultra vires* of the appellant corporation, and by-law no. 11, in so far as it relates to restaurants or victualling houses, is a valid exercise of the municipality's powers. The statute does not require that the by-law shall also contain provisions limiting the number of restaurants, or regulating them: Biggar, Municipal Manual, 11th ed., p. 45.

The trial judge should have found that the powers conferred by s. 417 of The Municipal Act, R.S.O. 1914, c. 192, were grouped together because they were *in pari materia*, and that they did not constitute "one power, complex in its elements and indivisible", and that it was not necessary that all such powers should be fully exercised to enable the corporation to exercise its licensing powers under the section. S. 417 is sufficiently complied with by the by-law here in question, which limits the number of restaurants by requiring the consent of the council before any licence is granted, and by providing that a licence may be revoked if it is shown that the licensee is not a fit and proper person to conduct the business. It is well established that, wherever possible, municipal by-laws are to be benevolently interpreted, and that they are to be supported if possible: *Re Harper and The City of St. Thomas*, [1939] O.R. 525; *Re Borthwick and The City of St. Thomas* (1885), 9 O.R. 114; *Re Stewart and Town of St. Mary's* (1915), 34 O.L.R. 183 at 184, 24 D.L.R. 26.

Since, as pointed out earlier, a trial was unnecessary, the respondents should not in any event have been awarded the costs of an action.

R. M. Willes Chitty, K.C., for the plaintiffs, respondents: The trial judge refers throughout to s. 253 of The Municipal Act, R.S.O. 1914, c. 192; the corresponding section in R.S.O. 1937, c. 266, is s. 271. Does this section entitle the municipality to provide for licensing only? The licensing of a restaurant is authorized by s. 436(2) (s. 417 in 1914), but that section contains a clear distinction. Subs. 2 only authorizes the licensing and regulating of *places*, and it is to be noted in contrast that subs. 1 gives power to license suitable *persons* to keep intelligence offices. This distinction has not been drawn in any of the cases, probably because all the cases in which the exercise

of a power under s. 271 has arisen have been cases where the municipality's power to license has been a power to license a person in respect of a particular business, and none of them has dealt with a power to license a place for the carrying on of a particular business therein. All the cases, most of which are set out in the reasons for judgment, are distinguishable on this ground. S. 271, being the section which confers extraordinary powers on the municipality, in derogation of common law rights, should be strictly construed against the municipality. Subs. 3 of s. 271 permits the municipality to utilize any licensing power as a matter of taxation. The whole frame of by-law no. 11, certainly in so far as the clauses referring to restaurant licences are concerned, shows that the municipality intended it only as a taxing measure, and that it was not intended, in enacting it, to exercise, or to reserve to the municipality the right to exercise, the powers given by s. 271(4). The by-law does not entitle the municipality to refuse a licence, but only to insist upon payment of the proper fee as a tax for the licence, and to prohibit the carrying on of the business without payment of the tax and obtaining of the licence. The power conferred by s. 271(4) is a most arbitrary one, and the application of the section should therefore be strictly confined to cases where the Legislature has authorized the municipality to licence a *person* to carry on a particular trade.

Inasmuch as the appellant here has limited its action to s. 436(2), it falls within the broad principle stated in *Re Rex v. Cullian*, [1937] O.R. 922, [1937] 4 D.L.R. 670. It has failed to exercise all the powers given under s. 436(2); it has not limited the number of victualling houses, nor has it dealt with all the places referred to in that subsection. Subs. 3 of s. 436 is merely ancillary to subs. 2.

The by-law, if it can be supported at all, is justifiable only as a taxing by-law, under s. 271(3). Ss. 2 and 3 of the by-law do not create any power or authority in the municipal corporation itself to take the initiative by refusing to grant a licence to an applicant who tenders a fee. The appellant has prejudiced any right it might have had by assessing and collecting a business tax.

At the conclusion of the argument, THE COURT delivered judgment orally, allowing the appeal. Written reasons were subsequently delivered as follows:

15th June 1943. ROBERTSON C.J.O.:—This is an appeal from the judgment of Plaxton J., after the trial of the action before him at St. Catharines. By the judgment certain paragraphs of appellant's by-law no. 11, passed in the year 1915, were declared invalid. These paragraphs provide for the payment of an annual fee to the treasurer of the municipality by every person who owns or keeps a victualling house, and prohibit any person from opening or carrying on a victualling house without first obtaining a licence from the council. At the conclusion of the argument we allowed the appeal, saying that we would deliver reasons in writing later.

There are other grounds upon which the judgment appealed from is open to attack, but I shall deal only with the one question, whether the by-law was one that appellant's council had the power to pass under the provisions of The Municipal Act, R.S.O. 1937, c. 266. I have read the judgment prepared by my brother Henderson, and I agree with him that the view taken by the learned trial judge too narrowly restricts municipal councils in the exercise of the powers expressly given them by The Municipal Act.

By an old provision of The Municipal Act, now s. 436(2), the council is authorized to pass by-laws for limiting the number of, and licensing and regulating, victualling houses, etc. The by-law now in question provides for licensing, but does not provide for limiting the number of or regulating these places. The learned trial judge was of the opinion that the power conferred by the statute is indivisible, and must be exercised in its entirety or be left alone. He held that a by-law that provided merely for licensing these places, and did not also provide for limiting their number and for regulating them, was not passed in the valid exercise by the council of its powers. He relied particularly upon the judgment of Middleton J.A. in *Re Rex v. Cullian*, [1937] O.R. 922, [1937] 4 D.L.R. 670.

I do not find it necessary for the decision of the case in hand to express any opinion upon the decision of Middleton J.A. in the *Cullian* case, holding a by-law passed under another section of the statute invalid. I prefer to leave the decision of so able and careful a judge without comment until it becomes necessary to deal with the very matter that he dealt with, and until I have heard argument upon it. I agree, however, with Henderson J.A. that the dictum he has quoted from the judgment in the

Cullian case, however appropriate it may be to that case, is not applicable to s. 436(2), nor does it state a principle that is applicable generally to the powers given municipal councils by the series of sections of The Municipal Act beginning with s. 404 and composing Part XIX of that Act.

A brief examination of the sections themselves will show how impossible it is to interpret them according to the principle laid down by the trial judge in this case. A council may, for example, under s. 404(7), pass by-laws for constructing, maintaining, improving, repairing, widening, altering, diverting and stopping up drains, sewers, or water-courses. No one, I am sure, would contend that a council cannot by by-law provide for constructing a drain or sewer unless by the same by-law it further provides for widening, altering and diverting it, and also for stopping it up.

S. 404(24) authorizes by-laws to be passed for erecting, maintaining, operating and renting grain elevators, wharves, piers and docks in harbours and floating elevators, etc. Could it be contended reasonably that a by-law that provided for erecting and operating a grain elevator must also provide for renting it, and further, that the by-law, at the same time, must make similar provisions for wharves, piers and docks and all the other things that the statute authorizes? Surely a municipal council can provide for any one or more of these things without undertaking all of them.

Referring to another part of The Municipal Act, by s. 343 a council may pass by-laws for acquiring or expropriating any land required for the purposes of the corporation, and for erecting buildings thereon. Is it conceivable that the power to acquire or to expropriate land is intended to be exercised only by a by-law that also provides for erecting buildings upon it? The purpose for which the land is required may not call for any buildings, or there may be buildings already upon the land, suitable for the purposes of the municipality.

It is, I suppose, conceivable that there are instances where, because of the special nature of the subject-matter or for some other exceptional reason to be found in the statute, the power conferred can, on a proper interpretation, only be exercised in the restricted manner indicated by Middleton J.A. in the *Cullian* case, and the statutory provision under consideration in that case may be one such instance. The rule stated in that case,

however, must, in my opinion, whenever it is properly applied, rest upon some special character of the subject-matter, or upon the nature of that which is authorized to be done, from which it ought to be inferred that the Legislature intended that the power conferred should be exercised in its entirety or not at all. It may, for example, have been considered that the several forms of advertising that are the subject-matter of the subsection considered in the *Cullian* case, were so related that none of them should be omitted from a by-law passed under that provision. Unless there is something to be found in the provision of the statute that indicates that its operation should be so restricted, I know of no rule of interpretation that would require that a municipality should exercise to the full the power given it, or not exercise it at all. Doubtless the powers of a municipality are limited to what are given by statute, but to exercise a power to less than its full extent is not to exceed it. To do one thing when two or more are authorized is not to do something unauthorized, unless all that is authorized is to be deemed unseverable, in the intention of the Legislature expressly declared or properly to be inferred.

The Municipal Act provides a code for the self-government of municipalities in every part of the Province, municipalities greatly varying in size, in wealth and in the character and habits of the people and their occupations and industries. So long as the limits of their statutory powers are not exceeded it is essential that the local councils should have a discretion, and use their own judgment, in regard to the by-laws that are desirable and necessary for the good government of their respective municipalities. The terms in which the statute is expressed do not require that it should be interpreted in the restricted way adopted by the trial judge, and I know of no warrant for so doing. It would prevent the exercise of a reasonable degree of self-government in the manner best suited to local needs.

HENDERSON J.A.:—An appeal from the judgment of Plaxton J., dated 15th January 1943.

The plaintiff brought this action claiming: (1) a declaration that the plaintiff had complied with para. 2 of by-law no. 11 passed by the defendant corporation in 1915, entitling it to the issue of a licence for a restaurant; (2) a declaration that under the terms of the said by-law the defendant had no right to refuse

the issue of a licence to the plaintiff; (3) a declaration that by-law no. 11 was a taxation by-law and not a by-law passed under the powers of the municipality to regulate the businesses therein dealt with; (4) alternatively, a declaration that by-law no. 11 of 1915 was not a proper exercise of the powers delegated to the municipality by the Legislature in this regard; (5) a *mandamus* or mandatory order directed to the defendant to issue or to cause the issue to the plaintiff of a licence according to the terms of their application therefor.

By-law no. 11 of 1915, passed on 13th May 1915, purports to be "a by-law to provide for the prices to be paid for licenses." By clause 1 it enacts "That the charges hereinafter set out shall be levied and collected from all persons obtaining licenses for the several trades, businesses or objects hereinafter mentioned." Then, by clause 2: "Every person who owns or keeps a victualling house, ordinary, or house where fruit, fish, oysters, clams or victuals are sold to be eaten therein must pay an annual fee of twenty dollars to the Treasurer of the Municipality of the Town of Dunnville, on or before the 15th day of May in each year. This shall not be held to apply to Confectioners selling ice cream." And by clause 3: "No person or persons shall be allowed to open up or carry on a victualling house as defined in the previous paragraph in the said Town, without first obtaining a proper license from the Council."

There are other provisions with respect to other classes of business, but the by-law does not appear to contain any provisions regulating the carrying on of a victualling house, etc.

The learned trial judge, following the decision of my brother Middleton in the case of *Re Rex v. Cullian*, [1937] O.R. 922, [1937] 4 D.L.R. 670, came to the conclusion that the by-law in question here, at any rate as regards paras. 2 and 3 thereof, was invalid, and gave judgment for the plaintiffs so declaring, together with the costs of the action.

In the case just cited, which was concerned with a case stated by a magistrate for the purpose of determining the validity of an acquittal of the respondent there, for an alleged breach of a city of Toronto by-law passed under s. 397(54) of The Municipal Act, R.S.O. 1927, c. 233, which empowered the municipality to pass a by-law "for prohibiting or regulating the erection of signs or other advertising devices, and the posting of notices on buildings or vacant lots within any defined area or areas or

on land abutting on any defined highway or part of a highway", my brother Middleton is reported at p. 923 to have said:

"I think this present by-law is defective because the municipality is empowered to prohibit or regulate the erection of signs or other advertising devices and the posting of notices, but what the council has undertaken to do is to pass a by-law regulating the erection of signs and other advertising devices, but saying nothing whatever about the posting of notices.

"I think the municipal powers are limited by the precise words of the legislative enactment, and the municipality must do all that is authorized by The Municipal Act or leave the subject alone."

With great respect I am unable to agree with this statement. I am of opinion that where a municipal council is given power to license and regulate and limit the number of licensees, it is quite open to the municipal council to exercise any or all of the powers conferred upon it. The by-law in question here is passed under the then existing provisions of what is now R.S.O. 1937, c. 266, s. 436, subs. 2, which is to the same effect as the old section, and reads:

"2. For limiting the number of and licensing and regulating victualling houses, ordinaries, and houses where fruit, fish, oysters, clams or victuals are sold to be eaten therein, and places for the lodging, reception, refreshment or entertainment of the public, and for revoking the license.

"(a) The sum to be paid for the license shall not exceed \$20."

As I have said, the by-law attacked does not purport to regulate victualling houses, etc., nor does it limit the number.

The point was considered by Mr. Justice Hogg in *Re Harper and The City of St. Thomas*, [1939] O.R. 525.

I am inclined to think that the decision in *Re Rex v. Cullian*, *supra*, can be distinguished on the facts of the case, but I have thought I should express my view having regard to the passage I have quoted from the judgment of my brother Middleton.

If the municipal council must do all that is authorized by any given section of The Municipal Act, or leave the subject alone, among the multitudinous provisions of the statute conferring legislative powers on municipal councils to license and regulate and in some cases to limit the number of licences and in some cases to prohibit, some strange and rather impossible results would ensue.

Mr. Chitty urged in his argument that the appellant had prejudiced its rights by assessment and collection of a business tax. The right to assess and collect a business tax is in no way dependent upon the licensing powers of the council.

I think, therefore, the appeal should be allowed with costs and the action dismissed with costs.

LAIDLAW J.A.:—The defendant appeals from the judgment of Plaxton J., dated 15th January 1943. The question to be determined is whether a by-law passed on 13th May 1915 by the defendant is a valid exercise of powers given to a municipal corporation by The Municipal Act, R.S.O. 1914, c. 192. The by-law is entitled "A By-law to provide for the price to be paid for licenses" and reads in part as follows:

"The Municipal Council of the Corporation of the Town of Dunnville, enacts as follows:

"1. That the charges hereinafter set out shall be levied and collected from all persons obtaining licenses for the several trades, businesses or objects hereinafter mentioned.

"2. Every person who owns or keeps a victualling house, ordinary, or house where fruit, fish, oysters, clams or victuals are sold to be eaten therein must pay an annual fee of twenty dollars to the Treasurer of the Municipality of the Town of Dunnville, on or before the 15th day of May in each year. This shall not be held to apply to Confectioners selling ice cream.

"3. No person or persons shall be allowed to open up or carry on a victualling house as defined in the previous paragraph in the said Town, without first obtaining a proper license from the Council."

It then provides for payment of an annual fee by plumbers and gas fitters or electricians and that "no license shall be transferred to others or retransferred without the sanction, consent and approval of the Council"; prohibits exercise of "the trade of a laundryman, or laundry company or laundry business" without a licence, and prescribes the fee; requires the "proprietor or keeper of any store or shop other than a tavern or shop licensed under the Liquor License Act, where cigarettes are sold by retail," to procure a licence, and fixes the fees and term of licence; fixes the fee to be levied and collected for each circus and each side show, merry-go-round, switchback railway, carousal, wax works, medicine vendors or small show; requires the proprietor or keeper of any scale weighing for the public,

etc., to procure a licence, fixes an annual fee to be levied and collected, and the fees a licensee may charge and collect for weighing. The by-law provides that "Any one of the licenses referred to in this by-law may be revoked if it be shown that the person to whom it has been issued is not a fit and proper person to conduct such business." There is also included a section whereby a penalty may be imposed for breach of any of the provisions of the by-law.

The power exercisable by the council of a municipality is contained in The Municipal Act, R.S.O. 1914, c. 192, s. 417(4), (5); and in s. 253.

I quote from s. 417 in part:

"417. By-laws may be passed by the councils of counties, towns . . .

Victualling Houses, etc.

"4. For limiting the number of and licensing and regulating victualling houses, ordinaries, and houses where fruit, fish, oysters, clams or victuals are sold to be eaten therein, and places not being a tavern or shop licensed under *The Liquor License Act* for the lodging, reception, refreshment or entertainment of the public.

"5. For revoking the license."

S. 253 provides that the power to license any business includes the power to prohibit the carrying on of it or the engaging in it without a licence: that the council may fix the sum to be paid for the licence, and the time it shall be in force; also that the granting or refusing a licence shall be in the discretion of the council.

Counsel for the respondent contends that the power given to a municipality under s. 417(4) "For limiting the number of and licensing and regulating" is indivisible; that it must be exercised in its entirety or not at all. He relies on the decision of Middleton J.A. in *Re Rex v. Cullian*, [1937] O.R. 922 at pp. 923, 924, [1937] 4 D.L.R. 670. See also *Re Harper v. The City of St. Thomas*, [1939] O.R. 525.

I think that case is distinguishable from the one presently under consideration and the principle stated by the learned jurist is not properly applicable to the question to be now determined. Middleton J.A. decided that the subject in respect of which the municipality was empowered to legislate could not be severed into parts so as to permit the exercise of the power

there in question as to one part only. That power was to pass by-laws in the matter of "the erection of signs or other advertising devices and the posting of notices." The matter could only be dealt with properly as a whole and not in parts. The essence of the decision is that the particular subject of the power was of such a nature, and the joinder of parts was such, as to make a separation of them improper. But the division into parts of a complete subject described in one section of The Municipal Act must not be confused with the separability of various powers in another and different section. There is nothing in the judgment of Middleton J.A. to say that the language "For limiting the number of and licensing and regulating" constitutes such a joinder of power as to prevent the exercise of one class without at the same time making use of the other classes of power. I think it would be a distorted construction of the section, and contrary to the intention of the legislation, to say that the council of a municipal corporation cannot, for example, pass a by-law to regulate the business described, unless it also limits the number of such businesses; that it cannot limit the number unless at the same time it licenses and regulates. On the contrary, the municipality is given power of three kinds, *viz.*, (1) for limiting the number, (2) for licensing and (3) for regulating. Each power can be employed as a separate one apart from the others and notwithstanding the conjunction of words in the statute. It follows, therefore, in my view, that effect cannot be given to the objection to the validity of the by-law on this ground.

It was argued that the by-law is a taxation by-law and not one passed under the powers of a municipality to regulate the businesses there dealt with; also that the appellant has prejudiced its rights by assessment and collection of a business tax. The by-law is clearly within the provisions of s. 417, *supra*, and the right to assess and collect a business tax is entirely independent from the powers contained therein.

The appeal should be allowed with costs and the action dismissed with costs.

Appeal dismissed with costs.

Solicitor for the plaintiffs, respondents: Charles F. Adams, Dunnville.

Solicitors for the defendants, appellants: Bradford & Raney, Dunnville.

[HOGG J.]

Schubert v. Sterling Trusts Corporation et al.

Negligence—Breach of Duty Created by Statute or Regulation having Statutory Force—Liability for Negligence of Independent Contractor—Work Inherently Dangerous—Fumigation of Apartment House—Failure to Take Required Precautions—The Public Health Act, R.S.O. 1937, c. 299, s. 5(d), and Regulations thereunder.

Where the owner of an apartment house, desiring to have an apartment in the house fumigated, entrusts the work to a person duly licensed under the regulations made in pursuance of what is now s. 5(d) of The Public Health Act, R.S.O. 1937, c. 299, and the latter fails to take the precautions required by the regulations, the owner, as well as the actual doer of the work, will be liable in damages if injury results from the failure to take the necessary precautions. Although the fumigator is an independent contractor rather than a servant, the principle is that where work to be done is inherently dangerous, an employer cannot, by delegating to another (whether servant or independent contractor) his duty to take precautions, escape liability for the failure to take such precautions. *McLean v. Crown Tailoring Co.* (1913), 29 O.L.R. 455; *Dalton v. Henry Angus & Co.* (1881), 6 App. Cas. 740; *Longmore v. The J. D. McArthur Company et al.* (1910), 43 S.C.R. 640, and other authorities, applied. It is immaterial that the owner could not, under the regulations, do the work himself, but was obliged to delegate it to a licensed person, since the regulations are designed primarily for the protection of the occupants of premises in such circumstances, rather than for the benefit and protection of their owners. The owner, further, will be liable under the rule in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, since the use made of the premises is one which brings with it increased danger to others. *Rickards v. Lothian*, [1913] A.C. 263 at 280; *Black v. The Christchurch Finance Company, Limited*, [1894] A.C. 48, applied. The case is not within the exception, established by such cases as *Green v. The Chelsea Waterworks Company* (1894), 70 L.T. 547, where the owner is given statutory authority to do the acts complained of, since the statute and regulations do not give authority to fumigate, but merely regulate the manner in which it shall be done, if at all.

AN action for damages under The Fatal Accidents Act, now R.S.O. 1937, c. 210, brought by the plaintiff as administratrix of the estate of Johann Damour and of that of Lydia Damour, his wife, both of whom died in circumstances set out in the judgment.

16th to 19th November 1942. The action was tried by HOGG J. without a jury at Toronto.

R. Roy McMurtry, for the plaintiff.

R. L. Kellock, K.C., for the defendant The Sterling Trusts Corporation.

A. O. L. Burnese, for the defendant Harris Safe-Way Exterminating Co.

H. R. Frost, K.C., for the defendant Commercial Finance Corporation Limited.

26th June 1943. HOGG J.:—This is an action brought under the terms of The Fatal Accidents Act, now R.S.O. 1937, c. 210, for damages on account of the death of Johann Damour and of Lydia Damour, his wife, caused, it is alleged by the plaintiff, by the negligent or wrongful acts of the defendants in connection with the fumigation, for the purpose of exterminating vermin, of certain rooms or premises in an apartment house building at No. 17 Jane Street, in the city of Toronto. The defendant The Sterling Trusts Corporation is the owner of the apartment house, as trustee for the defendant Commercial Finance Corporation Limited, and has the sole control and management of the premises.

It was moved at the opening of the trial by counsel for Commercial Finance Corporation Limited that the action be dismissed as against that defendant. Counsel for the plaintiff consented, but contended that costs should not be awarded against the plaintiff. The motion was granted and the question of costs was reserved. I can think of no good reason why this defendant should not have its costs against the plaintiff.

On 27th October 1934, the defendant Trusts Corporation instructed the defendant Harris Safe-Way Exterminating Co., in writing, to fumigate apartment 14 at 17 Jane Street, according to the Public Health Department regulations. The evidence establishes that the Harris company fumigated apartment 16 as well as apartment 14, and that when Mr. Patterson, the superintendent of buildings of the Trusts Corporation, was notified to this effect while the fumigating was being done, he told the Harris company he had no objection, and the fumigation of both apartments was paid for by the Trusts Corporation. I think it must be concluded that the work of fumigating apartment 16 was ratified and approved by the Trusts Corporation.

The process of fumigation was carried on by the Harris company by the creation of hydrocyanic acid gas, commonly known as cyanogen or cyanide gas, in apartments 14 and 16, the work being started in the morning of 29th October 1934. The evidence demonstrates that the gas in question is of a most deadly character to all living things, and is of a very penetrating nature. The evidence establishes, and I so find, that at about three o'clock in the afternoon of the day on which the fumigation was being done Johann Damour and his wife Lydia were found dead in their apartment, number 15, directly on the

opposite side of a four-foot corridor or hallway from apartment 14, which immediately adjoins apartment 16. Evidence was given to the effect that the gas, being of so diffusive a nature, could escape from apartments 14 and 16 by following openings around the pipes of the heating and plumbing equipment, or through any cracks or openings, and could even penetrate plastered walls. It is established beyond doubt that this unfortunate man and his wife were killed by coming in contact with hydrocyanic acid gas which had found its way from apartment 14 or 16, or from both, into apartment 15, occupied by the deceased persons.

The plaintiff seeks to hold the defendants liable on the ground of negligence in the carrying out of the work of fumigating, and also seeks to hold the defendant Trusts Corporation liable under the doctrine or rule of law laid down in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330.

The Public Health Act, R.S.O. 1927, c. 262, s. 6 (now R.S.O. 1937, c. 299, s. 5), provides that regulations may be made by Order-in-Council providing for, under clause (d), "the cleansing, purifying, ventilating and disinfecting of premises by the owners and occupiers or other persons having the care or ordering thereof".

On 3rd November 1933, Regulation 22 was passed by Order-in-Council setting out twenty rules to be observed in the fumigation of premises by cyanogen or cyanide compounds, that is to say, by the creation of hydrocyanic acid gas. These regulations had, while unrepealed, the same force and effect and authority as the statute itself, and a breach of the regulations made in accordance with the authority given by the statute becomes, for the purpose of obedience or disobedience, a breach of the statute. "The regulation is only the machinery by which Parliament has determined whether certain things shall or shall not be done": *Willingale v. Norris*, [1909] 1 K.B. 57, per Lord Alverstone C.J., at p. 64.

On 23rd February 1931, a by-law was passed by the Council of the City of Toronto enacting regulations dealing with the fumigation of premises in the city. S. 9 (now s. 8) of The Public Health Act provides that the regulations made under the Act shall supersede any municipal by-law, so far as such by-law is inconsistent with a statutory regulation. Paragraph or Rule 5 of the regulation made by virtue of the statute states that a

fumigator licensed under the regulation must be familiar with all municipal regulations regarding the use of cyanide compounds and comply with such regulations. The statutory rules touch on all matters covered by the municipal by-law.

I intimated at the close of the trial that I was of the opinion that the defendant Harris company was guilty of negligence which was the cause of the unfortunate mishap, and I have no hesitation in finding such negligence on the part of this defendant.

The defendant Harris company had a statutory duty imposed upon it to comply with the regulation already referred to, and the damage in respect of which relief is sought was within the mischief against which the regulation intended to provide. Furthermore, I find that this defendant was negligent at common law in that the Harris company did not exercise reasonable care. The regulation and the rules thereunder are mandatory, and Rule 8 requires that the fumigator shall see that all occupants of the premises to be fumigated, and all those in adjoining premises likely to be affected by the fumigation, shall be notified in advance of the fumigation. I do not hold with the narrow interpretation sought to be placed on the words of the rule "adjoining premises likely to be affected", as limiting such premises to those immediately touching upon those which were being fumigated. The broader meaning, I think, must be given to these words, and they should be considered to mean all premises which are likely to be penetrated by the gas in question in such quantity as might be dangerous. I think it should have been realized that the occupants of apartment 15 across the four-foot corridor might likely be affected by this most diffusive gas, and such is the expert opinion of Professor Joslyn Rogers, who gave evidence with reference to the characteristics of the gas under consideration and its use for the purpose of fumigation. No notice was given to either of the deceased.

Rule 19 provides that where the premises to be fumigated form part of an apartment house, certain notices are to be given by the local Medical Officer of Health. The evidence is to the effect that this duty was not properly carried out, as the required form under the statute, showing who were notified and how such notices were given, was not properly completed. In fact there is no proper proof that notices were given to anyone by the Medical Health Officer. Apart from this duty of notification by the Medical Health Officer, the fumigator is not relieved

of his duty to see that the persons referred to in Rule 8, already mentioned, are duly notified, and no evidence was given by any member of the Harris company, or by anyone else, that this defendant had carried out this obligation. There is evidence that no guards were placed by the fumigator, or other reasonable means taken by the Harris company to prevent persons entering into the danger zone, as is intended and required by Rule 14 of the statutory regulation.

On proof of a breach of a statutory duty imposed upon a defendant, and injury resulting therefrom to the plaintiff, *prima facie* the plaintiff has a good cause of action: *Graves v. Wimborne (Lord)*, [1898] 2 Q.B. 402. But entirely apart from the duty imposed by statute, the defendant Harris company was subject to the common law obligation to exercise reasonable care: *Hendrie v. Grand Trunk Railway Co.* (1921), 51 O.L.R. 191, 67 D.L.R. 165, 29 C.R.C. 72.

The case now under consideration is one to which the rule of evidence embodied in the maxim *res ipsa loquitur* must be held to apply, and the presumption of negligence raised by the circumstances of the death of Damour and his wife has not been refuted or explained by the defendant Harris company.

The defence put forward on behalf of the Trusts Corporation is one which requires careful consideration. It was argued by counsel on behalf of this defendant that because of The Public Health Act and the regulation and rules made thereunder, the Trusts Corporation was compelled by the statute, in order to have its premises fumigated,—a right which is recognized by s. 6(d) of the 1927 Act,—to employ a licensed fumigator, and that no course was open to this defendant, because of the requirement of Rule 1 of the regulation, but to delegate the work of fumigation to a contractor who held a licence for such purpose, such contractors, in connection with the Local Medical Health Officer, being the only persons authorized to have anything to do with the conduct of such work. In my opinion, the defendant Harris company must be held to be an independent contractor, and the fact that Mr. Patterson of the Trusts Corporation did instruct the caretaker of the apartment house to see that those notified by the Medical Health Officer's department had left before the fumigation commenced, and also to see that a guard was on duty in the corridor or hallway on the floor of the apartment house on which the fumigating was being

done, and that certain windows were kept open, is not evidence that the Trusts Corporation attempted to exercise control of any kind over the fumigator. As Mr. Patterson said, his instructions to the caretaker were in anticipation of the Health Department giving the proper notices and he did not instruct a notice to be given to the occupants of apartment 15. No evidence was offered that the instructions of Mr. Patterson to his caretaker had been carried out.

The question whether the Harris company is to be regarded as an independent contractor or not does not seem to be material to the issue, for where the work to be done is inherently dangerous the employer cannot delegate to another, whether servant or contractor, the duty to take precautions, and thus escape liability for the failure to discharge such duty. The principle has been put in the following language, taken from 21 Halsbury's Laws of England, 1st ed., p. 474, and quoted by Meredith C.J.O. in *McLean v. Crown Tailoring Co.* (1913), 29 O.L.R. 455, 15 D.L.R. 353: "An employer cannot divest himself of liability in an action for negligence by reason of having employed an independent contractor, where the work contracted to be done is necessarily dangerous, or is from its nature likely to cause danger to others unless precautions are taken to prevent such danger."

In *Dalton v. Henry Angus & Co.* (1881), 6 App. Cas. 740, at page 829, Lord Blackburn said: "a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor". The principle was upheld in the Supreme Court of Canada in *The City of St. John v. Donald*, [1926] S.C.R. 371, [1926] 2 D.L.R. 185, and in the recent cases of *Honeywell and Stein, Limited v. Larkin Brothers (London's Commercial Photographers), Limited*, [1934] 1 K.B. 191, and *Owners of The Steamship Pass of Ballater v. Cardiff Channel Dry Docks and Pontoon Co. Ltd.*, [1942] 2 All E.R. 79. In *Hardaker v. Idle District Council*, [1896] 1 Q.B. 335, where the District Council had authority, under The Public Health Act, 1878, to do certain work, Lindley L.J., said, at p. 340: "The council are not bound in point of law to do the work themselves—i.e., by servants of their own. There is nothing to prevent them from employing a contractor to do the work for them. But the council cannot, by employing

a contractor, get rid of their own duty to other people, whatever that duty may be. If the contractor performs their duty for them, it is performed by them through him, and they are not responsible for anything more . . . If, on the other hand, their contractor fails to do what it is their duty to do or get done, their duty is not performed, and they are responsible accordingly." In *Longmore v. The J. D. McArthur Company et al.* (1910), 43 S.C.R. 640, Anglin J., at p. 645, expressed the essence of the principle in these words "*Quoad* that duty he is in fact the *alter ego* of the principal contractor".

It is true that the defendant Trusts Corporation, if it found it convenient or essential to have its premises fumigated, could not do this work itself except by special leave, which it would not be reasonable to expect it to obtain, but it could, because of the statute and the regulation, have the fumigating done only by the employment of a person licensed under the provision of the regulation. But, whether the Trusts Corporation, if it wished its premises fumigated, was compelled by the statute to get a licensed contractor to do the work, or whether it gave this work to a contractor to do as a matter of convenience, the fact remains that a hazardous and dangerous work was being done by a contractor, and it is this element which is at the root of the principle under consideration. That this is so would seem to follow from the language of Lord Lindley when he said in the *Hardaker* case: "their contractor fails to do what it is their duty to do, or to get done". Where the work is dangerous, the contractor is the *alter ego* of the employer, and is so, in my opinion, whether the owner of the premises is at liberty to employ any contractor to do such work, or whether, because of a statutory provision, the work can only be done by a contractor who has been duly licensed. Where the work was inherently dangerous, as it was where hydrocyanic acid gas was generated, there was for that reason cast upon the defendant Trusts Corporation and its contractor the duty to see that precautions were taken, which, if taken, would have prevented the disaster which occurred. There is nothing in The Public Health Act or the regulation or rules passed to carry out the object of the Act, which relieves the Trusts Corporation of this responsibility. The statute may provide that the work is to be delegated to a contractor, but the statute does not delegate the responsibility.

The object of s. 6(d) of The Public Health Act, 1927, and the regulation and rules made as provided by that clause, is not the benefit and protection of the owners of premises, but primarily the protection of the occupants of such premises when the premises are undergoing the process of fumigation. The death of Damour and his wife was the very mischief against which the statute and regulation intended to provide. In *Managers of the Metropolitan Asylum District v. Hill et al.* (1881), 6 App. Cas. 193, Lord Watson, at p. 213, said: "Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights". There is no duty imposed by the statute upon the owners of premises to have them fumigated. The discretion which the owner has to have his premises fumigated is subject to regulation, the object of which is to preserve and protect private rights. I am not able to arrive at the conclusion that the statute takes away any of the rights of the plaintiff against the Trusts Corporation and relieves the Trusts Corporation of an obligation which rests upon it when a contractor is employed to carry out a dangerous undertaking.

I am of the opinion that the Trusts Corporation is liable to the plaintiffs for the negligence of the defendant Harris company.

The opinion is expressed by Sir John Salmond, in his work on the Law of Torts (9th ed., p. 572), that the rule known as that in *Rylands v. Fletcher*, *supra*, "is one of the most important cases of absolute liability recognized by our law—one of the chief instances in which a man acts at his peril and is responsible for accidental harm, independently of the existence of either wrongful intent or negligence." It is not necessary to state the rule. It is one of the landmarks of the common law. It was said by Lord Moulton in *Rickards v. Lothian*, [1913] A.C. 263 at 280, that the use to which the defendant's land is put must be "some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community". The facts in the case at bar show that a use was made of the premises in question which brought with it "increased danger to others". For the acts of a person, employed by the owner

or an occupier of land to deal in any way with dangerous things on the land, even though the person employed is an independent contractor, and though such contractor acts in excess or disregard of his authority, the owner or occupier of the land is liable: *Black v. The Christchurch Finance Company, Limited*, [1894] A.C. 48.

An exception to the rule in *Rylands v. Fletcher* is to be found in the case where a defendant has acted in pursuance of special statutory authority in placing a dangerous thing on the land from which it escaped: *Salmond, op. cit.*, p. 595. As authority for this exception the judgment in *Green v. The Chelsea Waterworks Company* (1894), 70 L.T. 547, is cited. In that case it was held by the Court of Appeal that the company, being authorized by Act of Parliament to lay a water main, and not being guilty of any negligence, was not liable in damages. It is to be gathered from the judgment of Lindley L.J. that although companies authorized to construct railways and carry water are looked upon as being outside the rule, the courts could possibly have applied the rule to such companies.

In the case which we now have under consideration, the Trusts Corporation is not given special statutory authority to have the highly dangerous operation of fumigation with hydrocyanic acid gas carried on on its premises. The statute merely directs, in the interest primarily of the safety of the occupants of the premises, that if the owner intends to have them fumigated in this manner, the work is to be done by a contractor who has received a licence to do this kind of work.

It was held in the Province of Manitoba in *Skubiniuk v. Hartmann* (1914), 6 W.W.R. 1133, 28 W.L.R. 518, 20 D.L.R. 323, affirmed with a variation in the Court of Appeal, 24 Man. R. 836, 7 W.W.R. 392, 29 W.L.R. 765, that the principle in *Rylands v. Fletcher* applied where the fumes of a dangerous gas escaped in fumigating a building and killed a person in the building. In that case the question of statutory regulations or rules does not appear to have been present.

I am of the opinion that the Trusts Corporation is liable to the plaintiff under the rule in *Rylands v. Fletcher*.

It was argued on behalf of the defendant Trusts Corporation that because of a certain term in the lease of apartment 15 from the Trusts Corporation to Johann Damour, this defendant was free from all liability in respect of the death of Damour and

his wife. The judgment of the majority of the Alberta Appellate Division in *Finnemore v. T. Underwood, Limited*, 24 Alta. L.R. 616, [1930] 2 W.W.R. 348, [1930] 3 D.L.R. 939, where the construction of a lease was in question, was cited as authority for the proposition that the defendant Trusts Corporation was not to be held liable. The term in the lease before the Alberta court was in no way similar to the term in the lease between the Trusts Corporation and Damour. There is nothing in the lease from the Trusts Corporation to Damour which can be constructed as releasing the Trusts Corporation from liability with respect to the unfortunate occurrence which is the cause of this action.

The evidence touching on the matter of damages is vague and unsatisfactory. [After analyzing this evidence, and considering the circumstances, his Lordship found that \$900 should be allowed in respect of the death of Mrs. Damour, and that the pecuniary loss resulting from the death of Johann Damour could be reasonably calculated at the sum of \$2,000.]

In *United Cigar Stores Ltd. v. Buller et al.*, 66 O.L.R. 593, [1931] 2 D.L.R. 144, it was held by Riddell, J.A., that while the plaintiff cannot claim beyond what were his rights at the *teste* of the writ, the rights of the defendant may be extended by events *post facto*, and up to judgment.

In view of this principle certain evidence introduced by the plaintiff and objected to by counsel for the Trusts Corporation relating to events subsequent to the institution of the action, is not relevant respecting the question of the amount of damages.

The plaintiff is entitled to costs.

Judgment accordingly.

Solicitors for the plaintiff: Fraser, Beatty, Palmer & Tucker, Toronto.

Solicitors for the defendant The Sterling Trusts Corporation: Mason Foulds Davidson & Kellock, Toronto.

Solicitors for the defendant Commercial Finance Corporation Limited: Briggs Frost & Birks, Toronto.

Solicitors for the defendant Harris Safe-Way Exterminating Co.: Millar & Hunter, Toronto.

[PLAXTON J.]

[COURT OF APPEAL.]

Deckert v. The Prudential Insurance Company of America.

Insurance—Recovery on Policy—Rule of Public Policy—Preferred Beneficiary, Designated in Policy, Murdered by Insured—Invalidity of Attempt by Insured to Dispose of Proceeds of Policy by Will—The Insurance Act, R.S.O. 1937, c. 256, ss. 129(1), 156, 160(3), (4).

Where the wife of an insured was named as beneficiary, and the insured was convicted of murdering his wife, and, while awaiting execution for his crime, made a will in which he purported to dispose of the proceeds of the policies, *held*, the rule of public policy, as laid down in such cases as *Beresford v. Royal Insurance Company, Limited*, [1938] A.C. 586, prevented recovery under the policies. The trust for the benefit of the wife, as a preferred beneficiary, under s. 156 of The Insurance Act, R.S.O. 1937, c. 256, having been terminated, the will constituted a definite attempt by the insured to dispose of the insurance moneys as part of his estate, and to permit recovery in such circumstances would be to permit the increase of the criminal's estate as a result of his crime.

Insurance—Beneficiaries—Whether Ordinary Beneficiary Entitled to Sue—The Insurance Act, R.S.O. 1937, c. 256—History of Legislation.

Semble, an ordinary, as distinct from a preferred, beneficiary has no right to sue an insurer under the policy. *Re Roddick* (1896), 27 O.R. 537; *Re Benjamin* (1926), 59 O.L.R. 392, not followed. (*Per Plaxton J.* The Court of Appeal did not deal with this point).

AN action to recover the proceeds of two policies of life insurance issued by the defendant upon the life of Gordon Matthew. The facts are fully stated in the judgment of Plaxton J.

7th May 1942. The action was tried by PLAXTON J. without a jury at Toronto.

W. E. West and R. S. Mills, for the plaintiff.

V. Evan Gray, K.C., for the defendant.

20th January 1943. Judgment was delivered dismissing the action with costs. Reasons for judgment were later delivered as follows:

28th May 1943. PLAXTON J.:—The question presented for decision in this case is whether the defendant is liable under two policies of life insurance issued by it, to pay to the plaintiff, as beneficiary, the insurance moneys, where the insured has died by the hands of justice in execution of a conviction and sentence for the crime of murder. The matter is *res nova* in Canada. There is, so far as research has disclosed, curiously, no decision of a Canadian court directly in point. The present case is, therefore, one of first impression in this country.

Policy M-5511095 (Ex. 2), issued by the defendant in January 1939, insured the life of Gordon Matthew, aged 20, in the sum of \$500. The father of the insured was named in the policy as beneficiary, but in July 1939, by declaration pursuant to The Insurance Act, R.S.O. 1937, c. 256, the beneficiary was changed to the wife of the insured, Mary Matthew. Policy No. 10687816 (Ex. 3), issued by the defendant in June 1939, insured the life of Gordon Matthew in the sum of \$5,000. The named beneficiary was the wife of the insured. At the Assizes at Brampton, in October 1940, the insured was tried and convicted of the crime of murdering his wife (the beneficiary under each of the said policies) by drowning her in Erindale pond, and was sentenced to be hanged (Ex. 6). While in gaol awaiting execution, the insured, on 19th January 1941, made a will (Ex. 1 is letters probate of this will), whereby he gave, devised and bequeathed "all my estate both real and personal including all policies of insurance effected upon my life . . . unto my sister, Josephine Dechert, absolutely," and appointed her the sole executrix of his will. On 23rd January 1941, the insured was executed by hanging (Ex. 5). The plaintiff contributed certain moneys, amounting in all to \$231, towards the expenses of her brother's defence at the criminal trial. She has not been repaid these moneys.

In April 1941 the plaintiff filed with the defendant duly completed proofs of death of the insured (Ex. 4), and claimed the insurance moneys as beneficiary under the will of the deceased insured.

The policies were not surrendered to the defendant before the trial, but at the trial the plaintiff, by her counsel, produced a memorandum of arrangement (Ex. 8), by which the policies were surrendered from the possession of George Walter Green (the father of the murdered wife) for the purposes of the trial. This was done upon the undertaking that if it should be decided that the plaintiff was entitled to the proceeds of the policies, she would pay to Mr. Green the amount of the premiums on the policies, which had been paid by Mr. Green, and that if the plaintiff was not successful the policies would be returned to Mr. Green.

Both policies of insurance upon the life of the deceased insured were in force at the date of his death.

Under each policy, the insurance moneys were expressed to be payable to the named beneficiary, Mary Matthew, wife of the insured, if living at the death of the insured; otherwise (in effect) to his executors, administrators or assigns. The right to change the beneficiary was reserved. Each policy, by its terms, became incontestable—in the case of policy Ex. 2, after one year from its date of issue, and in the case of policy Ex. 3, after two years from its date of issue—except for non-payment of premiums, and it was stipulated that if, within one year under the former policy, or within two years under the latter policy, the insured, whether sane or insane, should die by suicide, the liability of the company should not exceed the amount of the premiums paid on the policy. The policies contain no exception of liability on the part of the defendant in the event of the death of the insured by the hands of justice in punishment for crime.

I have had the advantage of written submissions of argument by counsel for each of the parties.

The main defence to the action is that the insured having come to his death at the hands of the law as a penalty for murder, the defendant is not, upon grounds of public policy, liable to pay to the plaintiff any moneys under the said policies of insurance.

It is not a matter of dispute that these policies are subject to the provisions of Part V, ss. 128 to 182 of The Insurance Act. By s. 129(1), it is provided that "Notwithstanding any agreement, condition or stipulation to the contrary, this Part shall apply to every contract of life insurance made in the Province after the 1st day of January, 1925, and any term in any such contract inconsistent with the provisions of this Part shall be null and void." By s. 130, "A contract is deemed to be made in the Province,—(a) if the place of residence of the insured is stated in the application or the policy to be in the Province; or (b) if neither the application nor the policy contains a statement as to the place of residence of the insured, but the actual place of residence of the insured is within the Province at the time of the making of the contract."

S. 151 defines the several classes of beneficiaries, *viz.*, beneficiaries for value, preferred beneficiaries and ordinary beneficiaries. A sister of an insured is not within the class of preferred beneficiaries so defined. Subs. 3 provides that "Ordinary

beneficiaries are beneficiaries who are not preferred beneficiaries, beneficiaries for value or assignees for value." It was not contended at the trial that the plaintiff was a beneficiary or assignee for value of the policies in question.

By s. 153(1), it is provided: "Subject to the rights of beneficiaries for value and assignees for value and to the provisions of this Act relating to preferred beneficiaries, the insured may designate the beneficiary by the contract or by a declaration, and may from time to time by any declaration appoint, appropriate or apportion the insurance money, or alter or revoke any prior designation, appointment, appropriation or apportionment, or substitute new beneficiaries, or divert the insurance money wholly or in part to himself or his estate." Having regard to the definitions of the expressions "beneficiary," "declaration" and "instrument in writing" set out in s. 128(3), (7) and (10), and to the pertinent decisions, it cannot, I apprehend, be doubted that the last will of the deceased insured was, in virtue of the statute, effective as a declaration to designate his sister, the plaintiff, as beneficiary under the policies in question: see *Re Wythe*, 59 O.L.R. 546, [1926] 4 D.L.R. 1083, affirmed 60 O.L.R. 323, [1927] 2 D.L.R. 1161; *Leavitt v. Spaidal* (1919), 45 O.L.R. 611, 49 D.L.R. 245; *Re Cheesborough* (1897), 30 O.R. 639; and *In re Cochrane* (1908), 16 O.L.R. 328.

By s. 156, the designation as beneficiary of a member of the class of preferred beneficiaries creates a trust in favour of the designated beneficiary, and the insurance money, or such part thereof as is or has been apportioned to a preferred beneficiary "shall not, except as otherwise provided in this Act, be subject to the control of the insured, or of his creditors, or form part of the estate of the insured." The Act contains no similar provision as to ordinary beneficiaries.

By s. 160(3), "In case of the death of a preferred beneficiary before the maturity of the contract . . . the insured may deal under s. 153 with the insurance money or part thereof in the same manner and to the same extent as if the deceased beneficiary had not been a preferred beneficiary." For instance, where a preferred beneficiary predeceased the insured, the latter, it was held, had power to give the insurance moneys by will to persons outside of the class of preferred beneficiaries: *Re Canadian Order of Foresters and McHutchion* (1909), 14 O.W.R. 251.

It is manifest that the plaintiff in the present action claims the proceeds of the policies in question as an ordinary beneficiary.

While the last will of the deceased insured was effective as a declaration to designate her a beneficiary under the policies, it was not effective to create a trust: *Re Jones*, [1933] O.W.N. 243. She became, in effect, a mere donee or volunteer of the insurance moneys under a voluntary settlement. In *In re Roddick* (1896), 27 O.R. 537, Street J., dealing with the status of ordinary beneficiaries under a policy of insurance, said, at p. 540: "There is in effect a voluntary settlement on the sisters of the insured; they are not within the protection of R.S.O. [1887] c. 136, but they are beneficiaries named in the policy; it is not shewn that the insured was not in a position to make a voluntary settlement at the time he effected this insurance, or at any time, and therefore it should stand." This decision was applied by Wright J. in *Re Benjamin* (1926), 59 O.L.R. 392 at 395, and by Hogg J. in *Re Thomson*, [1940] O.W.N. 546 at 547, 22 C.B.R. 384, 8 I.L.R. 70. In *Re Mendelson Estate*, 14 M.P.R. 506, [1940] 2 D.L.R. 382 at 389, 21 C.B.R. 304, 7 I.L.R. 210, Grimmer J., in the Court of Appeal for New Brunswick, described an ordinary beneficiary under a life insurance policy as "a mere volunteer."

It appears from these decisions that an insured would not be in a position to make a voluntary settlement of insurance moneys in favour of a designated beneficiary if, at the time of his declaration designating such beneficiary, he was insolvent, or if the transfer of the proceeds of the insurance moneys from his estate to the beneficiary made him insolvent: *In re Roddick*, *supra*; *Re Thomson*, *supra*. Subject to this, it would seem on the authority of these decisions (assuming them to have been rightly decided) that an ordinary beneficiary, whether named in the policy or by designation in the will of the deceased insured, takes the insurance moneys as against executors or creditors or legatees of the insured; see also *Re New York Life Insurance Co. and Fullerton* (1919), 45 O.L.R. 244.

In his submission of argument, counsel for the defendant contends that the plaintiff has no right of action on the policies in her personal capacity, and that in her representative capacity the plaintiff can assert only the rights of the estate of the insured flowing from his death at the hands of the law. The provisions of The Insurance Act do not appear to give an ordinary

beneficiary under a life insurance policy a right to bring action for the recovery of insurance moneys against the insurer. From 1903 to 1924 any person entitled as beneficiary under a contract of life insurance had a statutory right to sue for the insurance money in his own name, so long as he was a beneficiary "possessing at the time of action brought the right either at law or in equity to receive, and the right to give an effectual discharge to the insurer liable . . . for" the insurance money. In 1903, s. 80 of The Insurance Act, R.S.O. 1897, c. 203, was amended by 3 Ed. VII, c. 15, s. 3, to give that right expressly. This right of action was carried into the revision of 1914, R.S.O. 1914, c. 183, s. 89. In 1924, when the Act in its present form was passed (14 Geo. V, c. 50, s. 275), the provision giving an express right of action to a beneficiary was dropped: *Foster v. The Prudential Insurance Company of America*, [1941] O.R. 145 at 149, [1941] 3 D.L.R. 598, 8 I.L.R. 163. The right of a beneficiary to sue for and receive the insurance money payable is purely statutory: *Youlden v. London Guarantee and Accident Co.* (1913), 28 O.L.R. 161 at 172, per Hodgins J.A., 12 D.L.R. 433.

The status of an ordinary beneficiary must, therefore, be determined under and in accordance with the general law of the Province—the law of England.

" . . . in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*." *Dunlop Pneumatic Tyre Company, Limited v. Selfridge and Company, Limited*, [1915] A.C. 847 at 853, per Lord Haldane L.C.

In *Vandepitte v. Preferred Accident Insurance Corporation of New York*, [1933] A.C. 70, at 79, [1933] 1 D.L.R. 289, [1932] 3 W.W.R. 573, Lord Wright, after quoting the foregoing passage, added:

" . . . a party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party. The trustee then can take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights. The action should be in the name of the trus-

tee; if, however, he refuses to sue, the beneficiary can sue, joining the trustee as a defendant . . . But here again the intention to constitute the trust must be affirmatively proved; the intention cannot necessarily be inferred from the mere general words of the policy."

The law is stated in much the same terms by Tomlin J. (as he then was) in *Royal Exchange Assurance v. Hope*, [1928] Ch. 179 at 183.

In the present instance, the last will of the deceased insured was, as I have said, effective as an exercise of the power of appointment conferred on the insured by s. 153 of The Insurance Act to designate the plaintiff as the beneficiary to whom, on his death, the policy moneys should be paid. The insured might, in virtue of the power conferred by s. 177 of the said Act, have appointed a trustee for his sister as beneficiary; but he did not do so. Neither under the terms of the policies nor under the terms of the deceased insured's will did the insured profess to create any express trust in respect of the policy moneys in favour of the plaintiff as beneficiary. The provisions of The Insurance Act, as has been observed, do create such a trust in favour of a preferred beneficiary—a trust which enables a preferred beneficiary to recover the policy moneys without the intervention of the insured's personal representative, as a trust fund in the hands of the insurer of which such a beneficiary is the owner in equity: *National Life Assurance Company of Canada v. McCoubrey*, [1926] S.C.R. 277 at 281, per Anglin C.J.C., [1926] 2 D.L.R. 550, and cases there cited. The provisions of the said Act do not, however, create such a trust in the case of ordinary beneficiaries: *Re Jones, supra*. Moreover, an insurance company cannot be deemed to be a trustee of the policy moneys; an insurance company is in the position of an ordinary debtor, and must be treated accordingly: *In re Haycock's Policy* (1876), 1 Ch. D. 611; *Matthew v. Northern Assurance Company* (1878), 9 Ch. D. 80; Macgillivray on Insurance Law, 2nd ed., p. 582. What, then, is the status at law or in equity of an ordinary beneficiary in respect of insurance moneys expressed under a life insurance policy to be payable to him?

In *Cleaver et al. v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147, a policy had been effected by one James Maybrick on his own life. It provided, in effect, that on the death of James Maybrick the money should be payable to Florence

Maybrick, his wife, if then living, and that otherwise it should be payable to his personal representatives. So the Court had to deal there, as I have to deal in the case of each of the policies in question here, with a policy which provided for the payment of the policy moneys, not to the person who effected the policy but to a third party. The question the Court had to decide was whether, inasmuch as the assured, James Maybrick, had been murdered by his wife, the insurance money formed part of the estate of the assured, seeing that the trust which in that case was expressly imposed upon the policy moneys by the Married Women's Property Act was a trust which could not in the circumstances be enforced. The decision, therefore, turned upon the Married Women's Property Act, 1882, but in the course of their judgments Lord Esher M.R. and Fry L.J. dealt with the case, in the first instance, as though the Act had no application at all, and they considered what was the real effect at law and in equity of an insurance policy effected by a man on his own life, that policy containing a provision that on the death of the assured the money should be paid to somebody other than the assured.

Lord Esher M.R., at p. 151, said this:

"This policy of insurance is in a somewhat peculiar form, which I suppose is of recent invention. It does not state on the face of it with whom it is made, but states that for the considerations therein mentioned the defendants make the insured a member, and promise that on his death the policy money shall be payable to Florence Maybrick his wife, if then living, otherwise to his legal personal representatives. I will first consider what the legal effect of such a policy would be apart from the Married Women's Property Act, and if no such Act had been passed. The contract is with the husband, and with nobody else. The wife is no party to it. Apart from the statute, the right to sue on such a contract would clearly pass to the legal personal representatives of the husband. The promise is one which could only take effect upon his death, and therefore it must be meant to be enforced by them. The condition on which the money is to become payable is the death of James Maybrick."

A little further on, he says:

"Apart from the statute, what would be the effect of making the money payable to the wife? It seems to me that as between the executors and the defendants it would have no effect. She

is no party to the contract; and I do not think that the defendants could have any right to follow the money they were bound to pay and consider how the executors might apply it. It does not seem to me that, apart from the statute, such a policy would create any trust in favour of the wife."

Fry L.J., at p. 157, said:

"James Maybrick insured his life in the policy in question in the year 1888, and by the proposal which was made part of the policy he expressed the policy to be effected for the benefit of his wife, and in the policy itself she is named as the payee of the policy-moneys in the event, which happened, of her surviving her husband. Independently of the Married Women's Property Act, 1882, the effect of this transaction was, in my opinion, to create a contract by the defendants with James Maybrick that the defendants would, in the event which has occurred, pay Florence Maybrick the 2000*l.* assured; it would be broken by non-payment to her; but the cause of action resulting from such breach would vest in the executors of the assured, and not in the payee. She was, independently of the statute, a stranger to the contract; it might have been put an end to by the contracting parties without her consent, and the breach of it would have given her no cause of action against any one."

The reasoning of Lord Esher M.R. and of Fry L.J. in the passages of their judgments which I have quoted above was applied by Eve J. in *Re Burgess' Policy; Lee v. Scottish Union and National Insurance Company* (1915), 113 L.T. 443; by Romer J. in *In re Engelbach's Estate; Tibbetts v. Engelbach*, [1924] 2 Ch. 348; by Farwell J. in *Re Clay's Policy of Assurance; Clay v. Earnshaw*, [1937] 2 All E.R. 548; and by Farwell J. in *In re Sinclair's Life Policy*, [1938] Ch. 799.

It follows, on the authority of these decisions, (1) that the mere fact that the policy moneys are expressed to be payable to somebody other than the assured does not make the assured a trustee of the policy for the person nominated, and (2) that apart from statute and in the absence of the creation of any trust in his favour in respect of the policy moneys, an ordinary beneficiary under a life insurance policy, being a stranger to the contract, does not acquire any interest at law or in equity in the policy or the policy moneys, merely by reason of the fact that the policy moneys are expressed to be payable to him. He cannot, therefore, maintain any action against the insurer for

the recovery of the policy moneys. The cause of action passes to the personal representative of the deceased insured, and the policy moneys, if and when recovered, fall into his estate.

This conclusion is, I realize, at variance with the decisions in *In re Roddick, supra*, and *Re Benjamin, supra*. I cannot, after a most attentive consideration of the matter, reconcile those decisions with the decisions of the English courts to which I have referred and which appear to me, in light of the scheme of the life insurance legislation, to control the determination of the question under discussion. I am not aware that any of the insurance companies in Ontario has ever acted upon this view of the law; indeed I understand that their general practice as to payment of insurance moneys, where the beneficiary is an ordinary beneficiary, is quite at variance with it. The conclusion at which I have arrived upon the main issue in the present case renders it unnecessary for me to decide the question which I have discussed above, perhaps at too great length; but my reason for doing so is that the question is one of great practical commercial importance and since my examination of the law touching this question led me to the view which I have expressed, I consider it to be in the public interest that I should call attention to it. For the reasons I have indicated, I am disposed to think that the plaintiff has no right of action on the policies in her personal capacity, and can maintain the present action only in her representative capacity, *i.e.*, as sole executrix under the last will of the deceased insured, and for the benefit of his estate. However, the conclusion at which I have arrived upon the main issue is that whether she can maintain this action in her personal capacity or only in her representative capacity, her claim in either case fails. Her claim fails, I have concluded, upon two alternative grounds: (1) the policy contracts, upon their proper construction (entirely apart from any consideration of public policy), do not cover the contingency of death of the insured by the hands of justice in punishment for crime; and (2) the enforcement of the policy contracts, even if they did in terms cover such a contingency, would contravene public policy.

As to (1): What are the contracts made between the deceased assured and the defendant? Under each contract, the defendant undertook to pay the sum assured, upon the happening of the death of the assured, to the named beneficiary, or in the

event that the beneficiary predeceased the assured, to the latter's estate. The contracts contain no express reference to the contingency of death of the assured by the hands of justice.

In *Beresford v. Royal Insurance Company, Limited*, [1938] A.C. 586, [1938] 2 All E.R. 602 at 604, Lord Atkin said:

" . . . if there is no express reference to suicide in the policy two results follow. In the first place, intentional suicide by a man of sound mind, which I will call sane suicide, ignoring the important question of the test of sanity, will prevent the representatives of the assured from recovering. On ordinary principles of insurance law, an assured cannot by his own deliberate act cause the event upon which the insurance money is payable. The insurers have not agreed to pay on that happening. The fire assured cannot recover if he intentionally burns down his house, nor the marine assured if he scuttles his ship, nor the life assured if he deliberately ends his own life. This is not the result of public policy, but of the correct construction of the contract. In the second place, this doctrine obviously does not apply to insane suicide, if one premises that the insanity in question prevents the act from being in law the act of the assured. . . . The rights given to the parties by the contract must be ascertained according to the ordinary rules of construction, and it is only after such ascertainment that the question of public policy arises."

A similar view was adopted by the Supreme Court of the United States in *Ritter v. Mutual Life Insurance Company of New York* (1898), 169 U.S. 139. The Court there held that where an assured, while sane, had committed suicide, the policies on his life were not enforceable. The first ground on which the judgment was put was that such a death was not within the policy, which contained no express condition relevant to suicide; and the second ground of the judgment was that to allow recovery would be against public policy. Harlan J. said, at pp. 151, 154:

"But is it not an implied condition of such a policy that the assured will not purposely, when in sound mind, take his own life, but will leave the event of his own death to depend upon some cause other than wilful, deliberate self-destruction? Looking at the nature and object of life insurance, can it be supposed to be within the contemplation of either party to the contract that the company shall be liable upon its promise to pay, where

the assured, in sound mind, by destroying his own life, intentionally precipitates the event upon the happening of which such liability was to arise? . . . When the policy is silent as to suicide, it is to be taken that the subject of the insurance, that is, the life of the assured, shall not be intentionally and directly, with whatever motive, destroyed by him when in sound mind."

On the same principle, in *Burt v. Union Central Life Insurance Company* (1902), 187 U.S. 362, the Supreme Court of the United States held that a policy of life insurance, silent on the point, did not cover the contingency of death of the assured by the hands of justice. Brewer J., delivering the judgment of the Court, said, at pp. 365, 366:

"It cannot be that one of the risks covered by a contract of insurance is the crime of the insured. There is an implied obligation on his part to do nothing to wrongfully accelerate the maturity of the policy. Public Policy forbids the insertion in a contract of a condition which would tend to induce crime."

These pronouncements appear, therefore, to justify the conclusion that the policy contracts under which the plaintiff claims do not, on their proper construction, cover the contingency of death of the insured by the hands of justice in punishment for crime.

As to (2): What is meant by the term "public policy," and by what principles should a judge be guided when public policy is invoked as a ground for voiding a contract otherwise possible and legal? "Public Policy," said Lord Truro in the remarkable case of *Egerton v. Brownlow et al.* (1853), 4 H.L. Cas. 1 at 196, 10 E.R. 359, "is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good." But this definition, though it has been often quoted, is in truth little more than a generalization reminiscent of its early antecedents of the fifteenth and sixteenth centuries. In *The Dyer's Case* (1413), Y.B. 2 Hen. V. 5, pl. 26, the acknowledged source of the characteristic principle of the law relating to covenants in restraint of trade, a condition in suit is declared to be *encounter common ley*. That, too, which is also inconvenient, may be taken from Littleton (Inst. II, ss. 87, 136, 138, 201, 265, 440), as *encounter common ley* in very much the same sense. Coke (*ibid.*, s. 138) indeed notes that *nihil quod inconveniens est licitum*: "It is better saith the law to suffer a mischief that is peculiar to one than

an inconvenience that may prejudice many," and this maxim is treated by Pollock C.B. in *Egerton v. Brownlow et al.*, *supra*, at pp. 144, 145, as an early expression of the doctrine of public policy. It is not surprising, then, to find that public policy, as a basis of judicial decision, has been described as "a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law": Per Burrough J. (quoting, I believe, Hobart C.J.) in *Richardson v. Mellish* (1824), 2 Bing. 229 at 252, 130 E.R. 294; as "a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights:" per Parke B. in *Egerton v. Brownlow et al.*, *supra*, at p. 123; as a doctrine that "would introduce an ever-shifting principle of decision": per Alderson B. in *Egerton v. Brownlow*, at p. 106; as "a very unstable and dangerous foundation on which to build until made safe by decision": per Lord Lindley in *Janson v. Driefontein Consolidated Mines, Limited*, [1902] A.C. 484 at 507; and as "a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy": per Cave J. in *In re Mirams*, [1891] 1 Q.B. 594 at 595, quoted by Lord Bramwell in *Mogul Steamship Company, Limited v. McGregor, Dow & Co. et al.*, [1892] A.C. 25 at 45.

The term "public policy" has, indeed, been said to be not susceptible of precise definition: *Besant v. Wood* (1879), 12 Ch. D. 605 at 620, per Jessel M.R.; *Davies v. Davies* (1887), 36 Ch. D. 359 at 364.

In *Egerton v. Brownlow et al.*, *supra*, at pp. 123, 124, Parke B. pointed out that public policy was a term capable of being understood in different senses. In its ordinary sense it meant political expediency or that which was best for the common good in the community. To allow public policy in this sense to be a ground of judicial decision would, in his view, lead to the greatest uncertainty and confusion. It is the province of the statesman, not of the lawyer, to discuss, and of the legislature to determine, what is best for the public good, and to provide for it by proper enactments. Some of the earlier decisions, the learned Baron conceded, might no doubt have been founded upon the prevailing and just opinion of the public good: for instance, the illegality of covenants in restraint of marriage or trade. These had become part of the recognized law, and they

were, therefore, bound by them. “. . . but we are not”, he concluded, “thereby authorized to establish as law everything which we may think for the public good and prohibit everything which we think otherwise. The term ‘public policy’ may indeed be used only in the sense of the policy of the law, and in that sense it forms a just ground of judicial decision. It amounts to no more than that a contract or condition is illegal which is against the principle of the established law. If it can be shown that any provision is contrary to well-decided cases, or the principle of decided cases, and void by analogy to them, and within the same principle, the objection ought to prevail.” In the same case, Alderson B., expressing a similar opinion, said, at p. 107: “My duty is as a Judge to be governed by fixed rules and settled precedents.”

Parke B.’s view of public policy, though it did not gain the day in 1853, is, as Lord Wright concludes in his illuminating discussion of public policy in *Fender v. St. John-Mildmay*, [1938] A.C. 1 at 38, 39, 40, and as his citations fully bear out, the view which has in modern times prevailed. “Public policy, like any other branch of the law,” Lord Wright says at p. 39, “is governed by the judicial use of precedents.” In *Janson’s* case, *supra*, Lord Halsbury L.C. denied that any court could invent a new head of public policy. This is true, as Viscount Haldane observed in *Rodriguez v. Speyer Brothers*, [1919] A.C. 59, at p. 79, and as other decisions indicate, only in the sense “that when it is said that things are unlawful because they are contrary to public policy, it is meant that they have either been enacted or assumed to be unlawful by the common law, and not because the Court has any right to declare them to be so. But the observation must be taken with this qualification that what the law recognises as contrary to public policy turns out to vary greatly from time to time.” See *Evanturel v. Evanturel* (1874), L.R. 6 P.C. 1 at 29, C.R. [7] A.C. 117; *In re Bowman; Secular Society, Limited v. Bowman*, [1915] 2 Ch. 447 at 466; and *Naylor, Benson & Co., Limited v. Krainische Industrie Gesellschaft*, [1918] 1 K.B. 331 at 342. It is this fluid element about the doctrine of public policy and its application under new conditions that gives point and force to the serious judicial warning “that the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds. I

think that this should be regarded as the true guide." *Fender v. St. John-Mildmay*, *supra*, at p. 12, per Lord Atkin. More especially should this be so, seeing that evidence is not admissible to show what public policy is or to show the effect of a contract or disposition alleged to infringe public policy. Public policy is a question of law, to be determined by the Court after ascertaining the relevant facts: *Mogul Steamship Company, Limited v. McGregor, Dow & Co. et al.*, *supra*, at p. 45, per Lord Bramwell; *In re Wallace; Champion v. Wallace*, [1920] 2 Ch. 274 at 302; *Re Millar*, [1937] O.R. 382 at 397, 400, [1937] 3 D.L.R. 234, per Rowell C.J.O.

The whole doctrine of public policy and the decisions relating to it have been so fully and luminously discussed in comparatively recent decisions as to make any extended discussion of this interesting topic, or review of the decisions, on my part, a work of supererogation. I refer to *Fender v. St. John-Mildmay*, *supra*; *Beresford v. Royal Insurance Company, Limited*, [1938] A.C. 586, [1938] 2 All E.R. 602, affirming [1937] 2 K.B. 197, [1937] 2 All E.R. 243; *Re Millar*, [1937] O.R. 382 at 392, 400, [1937] 3 D.L.R. 234, affirmed [1938] S.C.R. 1 at 4, 7, [1938] 1 D.L.R. 65.

I come now to the question to be decided in this case: Would the enforcement of the policy contracts against the defendant, in the circumstances of the case, be contrary or obnoxious to public policy? Is there any principle of public policy, settled by the decisions, applicable to this case—a principle which renders the death of the insured by legal execution in punishment of crime a bar to the present action?

Clear and unequivocal is the answer given by the decisions.

The principle applicable has been stated in several decisions, but nowhere more forcibly than by Fry L.J. in *Cleaver et al. v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147, which statement of the principle was recently applied in the Court of Appeal and the House of Lords in *Beresford's case*, *supra*, Fry L.J. said, at p. 156:

"The principle of public policy is in my opinion rightly asserted. It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misde-

meanour. It may be that there is no authority directly asserting the existence of the principle; but the decision of the House of Lords in *Fauntleroy's Case*, [*infra*] appears to proceed on this principle, and to be a particular illustration of it. This principle of public policy, like all such principles, must be applied to all cases to which it can be applied without reference to the particular character of the right asserted or the form of its assertion. In *Fauntleroy's Case* it was held to prevent the assignees of a forger from claiming the benefit of a policy on his death at the hands of justice by reason of his forgery. It would equally apply, it appears to me, to the case of a cestui que trust asserting a right as such by reason of the murder of the prior tenant for life or of the assured in a policy; and it must be so far regarded in the construction of Acts of Parliament that general words which might include cases obnoxious to this principle must be read and construed as subject to it."

In the same case, Lord Esher M.R. said, at p. 152: "That the person who commits murder, or any person claiming under him or her, should be allowed to benefit by his or her criminal act, would no doubt be contrary to public policy."

The decision in *Fauntleroy's case* (*Amicable Society for a Perpetual Assurance Office v. Bolland et al., Assignees of Fauntleroy* (1830), 2 Dow & Cl. 1, 6 E.R. 630, 4 Bligh N.S. 194, 5 E.R. 70) was, it will be noted, treated by Fry L.J. as a particular illustration of the principle of public policy enunciated by him. It appears to me to be indistinguishable in principle from the present case. By a policy of insurance which, on 11th January 1815, Henry Fauntleroy effected on his life with the Amicable Society, Fauntleroy was admitted a member of that Society, and the corporation bound itself and its successors to pay to his executors, administrators or assigns such a proportion or share of the joint stock or fund as upon his death should become due according to the charters and by-laws of the said Society. By a declaration of trust dated 19th September 1819, Fauntleroy assigned all his right, title and interest in the insurance moneys to become due under the said policy of insurance on his death to certain trustees, in trust for a named beneficiary or donee. The assignment was a purely voluntary one. On 29th October 1824, a commission of bankrupt was issued against Fauntleroy, who was duly declared bankrupt, and his estate and effects were vested in the respondents as his assignees

under the commission. On 30th October 1824, Fauntleroy was convicted of forgery, and forgery being at that time a capital felony, he was sentenced to be hanged and was executed on 30th November 1824.

The assignees in bankruptcy brought action to recover the proceeds of the insurance policy. The voluntary assignee under Fauntleroy's declaration of trust was made a defendant in the action, but it appears from the report that the respondents, the assignees in bankruptcy, effected a settlement with the claimants on her behalf and obtained an assignment to them of the policy of insurance. The judgment of the House of Lords, delivered by Lord Lyndhurst L.C., reversing the judgment of the Master of the Rolls, held that the estate of the assured could not take any benefit from the illegal acts of the assured, and that the claim of the assignees in bankruptcy failed for that reason. The pertinent part of the judgment is short and may be quoted in full (pp. 211-2, 4 Bligh N.S.):

"The question under these circumstances is this: whether the assignees can recover against the Insurance Company the amount of this insurance; that is to say, whether a party, effecting with an insurance company, an insurance upon his life, and afterwards committing a capital felony, being tried, convicted, and finally executed, whether, under such circumstances, the parties representing him, and claiming under him, can recover the sum insured in the policy so effected. I attended to the argument at the bar, in conjunction with the Noble Lord now present [Lord Radnor], and we have both come to the conclusion that the assignees cannot maintain this suit.

"It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against: that is, that the party insuring had agreed to pay a sum of money year by year, upon condition, that in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money—is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes? namely, the interest we have in the welfare and prosperity of our connexions. Now, if a policy of that description, with such a form

of condition inserted in it in express terms, cannot, on grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, that we can sustain such a claim? Can we, in considering this policy, give to it the effect of that insertion, which if expressed in terms would have rendered the policy, so far as that condition went at least, altogether void?

“Upon this short and plain ground, therefore, independently of the more complicated arguments referred to by the counsel at the bar, in the discussion of this case, I think that this policy cannot be sustained, and that the Respondents are not entitled to recover.”

This decision has been commented upon in several later decisions of English and Canadian courts; its authority remains unquestioned and unimpaired.

In *Borradaile v. Hunter* (1843), 5 Man. & G. 639, 134 E.R. 715, a policy of life insurance contained a proviso, *inter alia*, “that in case the assured . . . shall die by his own hands, or by the hands of justice, or in consequence of a duel”, the policy should be void. That condition was held to cover a case where the assured took his own life, intending to do so, but being at that time not capable of judging between right and wrong, and in that sense insane. The decision is one of the Court of Common Pleas. Erskine J., at p. 658, says: “It has been argued on the part of the plaintiff, that, as the very object of a life insurance is, to secure a provision for a surviving family against the fatal consequences of decease in the assured, if the act occasioning the death can be traced as the result of a diseased mind, the case comes within the main scope and object of the contract of insurance. This argument would have been unanswerable if the policy had been wholly silent on the subject, as in the case of *Amicable Society v. Bolland*, [*supra*] ; or if the proviso had been couched in terms pointed only to acts resulting from a criminal intention; but the very object of a proviso like the present, is to take out of the operation of the general terms of the policy, death resulting from causes which would otherwise fall within the general scope of the contract, although, *ex abundanti cautela*, it also includes cases which the law itself would except, as those of criminal suicide, and death by sentence of the law or duelling.”

In *Horn v. The Anglo-Australian and Universal Family Life Insurance Company* (1861), 7 Jur. N.S. 673, where the claim of the personal representative of an insured who had committed suicide while in a state of temporary insanity was upheld, Wood V.C. said: "It was held by the House of Lords in *Fauntleroy's* case, [*supra*], that it would be contrary to public policy to insure a man a benefit upon his dying by the hands of public justice; and as it would be contrary to the policy of the law for any such express contract to be made, so no contract could be implied in the policy to pay the amount in such an event; and accordingly, although nothing was said in the policy one way or the other, the law would infer as a condition that the execution of the insured, in consequence of a crime committed by him, was not one of the cases in respect of which the policy would become payable. So the argument might be pursued, although I do not know that any case has so decided, to the same extent in the case of a person committing suicide while in a sane state of mind, thus committing a felony, and losing his life thereby; but I know of no rule of law that can justify me in extending that to the case of a person committing suicide while in a state of insanity, and therefore committing no legal offence."

In *Beresford v. Royal Insurance Company, Limited*, [1938] A.C. 586, [1938] 2 All E.R. 602, a condition in an insurance policy, issued in 1925, provided that: "If the life . . . assured shall die by his own hand, whether sane or insane, within one year from the commencement of the insurance, the policy shall be void as against any person claiming the amount hereby assured or any part thereof." The premiums were regularly paid until 1934, when the assured committed suicide, and it was found by the jury, as a fact, that the assured was sane at the time of his death. It was held by the House of Lords, affirming the judgment of the Court of Appeal ([1937] 2 K.B. 197, [1937] 2 All E.R. 243), that although the condition in the policy necessarily implied a positive undertaking by the company to pay if the assured died by his own hand, sane or insane, after the expiry of a year from the commencement of the insurance, it was contrary to public policy that either a person who had committed a crime or his personal representative should be allowed to benefit by that crime. In the circumstances, therefore, the contract was unenforceable.

In the Court of Appeal, Lord Wright M.R., after quoting the judgment of the House of Lords in *Fauntleroy's* case, *supra*, said, at p. 213:

"This was a less obvious case than a case of suicide. The forger had no intention of being executed; he presumably hoped to escape detection. The essential feature of the decision was that the Court would not allow a claim in contract to be based on the contracting party's crime as a necessary constituent of the cause of action, even though an interval of time and circumstance separated the crime from the resulting death."

In the same case in the House of Lords, Lord Atkin, in whose judgment Lords Thankerton and Russell of Killowen concurred, after also quoting from the judgment in *Fauntleroy's* case, said, at p. 597: "In this case the ground given is the removal of a restraint against the commission of crime."

In the Court of Appeal, Lord Wright M.R., after a lengthy review of the decisions, said at pp. 219-20:

"Opinions may differ whether the suicide of a man while sane should be deemed to be a crime, but it is so regarded by our law. . . . It may be that both ecclesiastical and civil penalties have been mitigated or abolished, but the criminal law still remains. Only the Legislature in this country can change the law in this matter, if it should so will. While the law remains unchanged the Court must, we think, apply the general principle that it will not allow a criminal or his representative to reap by the judgment of the Court the fruits of his crime. . . . We think that what Greer L.J. said in *Haseldine v. Hosken*, [1933] 1 K.B. 822 at 837, 'In this country, whatever may be the case in other countries, no person is allowed to insure himself against the commission of a crime,' applies without qualification to a suicide such as that in question. The overriding duty or inherent power of the Court to refuse its aid to enforce a promise to pay in such circumstances excludes its general duty to enforce performance of contracts."

In the House of Lords, Lord Atkin, after a review of the decisions, said at pp. 598-9:

"I think that the principle is that a man is not to be allowed to have recourse to a Court of Justice to claim a benefit from his crime whether under a contract or a gift. No doubt the rule pays regard to the fact that to hold otherwise would in some cases offer an inducement to crime or remove a restraint

to crime, and that its effect is to act as a deterrent to crime. But apart from these considerations the absolute rule is that the Courts will not recognize a benefit accruing to a criminal from his crime. . . .

"The remaining question is whether the principle applies where the criminal is dead and his personal representative is seeking to recover a benefit which only takes shape after his death. It must be remembered that the money becomes due, if at all, under an agreement made by the deceased during his life for the express purpose of benefiting his estate after his death. During his life he had power of complete testamentary disposition over it. I cannot think the principle of public policy to be so narrow as not to include the increase of the criminal's estate amongst the benefits which he is deprived of by his crime. His executor or administrator claims as his representative, and, as his representative, falls under the same ban."

It was presumably in the light of this decision that the Legislature of Ontario, by s. 5 of c. 11 of the statutes of 1940, amended The Insurance Act by enacting s. 175*a*, as follows: "An agreement, express or implied, contained in a contract of life insurance for the payment of insurance money in the event that the insured commits suicide shall be lawful and enforceable." The express mention of suicide in this section has effect, of course, to exclude the application of the terms of the enactment to other cases affected by the general rule of public policy.

In *O'Hearn v. Yorkshire Insurance Co.* (1921), 51 O.L.R. 130, 67 D.L.R. 735, the appellant sought to recover indemnity against damages, under a policy issued by the defendant company, by which it agreed to indemnify the plaintiff against loss by reason of the liability imposed upon him by law for damages on account of bodily injuries accidentally sustained, including death at any time resulting therefrom. The plaintiff, while driving his automobile upon a public highway, struck and injured a man, who died as the result of his injuries. The plaintiff suffered judgment for damages in respect of the injuries to the man, and, having paid the amount, sued the defendant company therefor. The plaintiff was drunk when he struck the man, and was driving at an excessive speed. He was convicted of an offence against what is now s. 285(4) of The Criminal Code, R.S.C. 1927, c. 36, and sentenced to two years' imprisonment.

The trial judge, Middleton J., held (50 O.L.R. 377, 64 D.L.R. 437, 37 C.C.C. 403) that it was contrary to public policy that the plaintiff should be indemnified against his own criminal act. It was contended for the plaintiff (appellant) that, as the defendant company had not in terms contracted to indemnify him against damages recovered for injuries caused by a criminal act, recovery might be had, unless the act of the appellant which caused the injury was an intentional act. In rejecting this contention, Meredith C.J.O. (Maclaren, Magee and Ferguson J.J.A. concurring) cited (pp. 132-3), amongst other authorities, but as the leading authority, the judgment of the House of Lords in *Fauntleroy's* case. This decision of the Court of Appeal was approved by the Supreme Court of Canada in *Home Insurance Company of New York et al. v. Lindal and Beattie*, [1934] S.C.R. 33 at 38, [1934] 1 D.L.R. 497*.

In *Bullas v. Empire Life Insurance Co.*, [1931] O.R. 769, [1931] 4 D.L.R. 443, Kelly J., discussing a defence to the plaintiff's claim based on grounds of public policy, said, at p. 776:

"Public policy is dealt with in Halsbury's Laws of England, vol. 17, at p. 556, para. 1109, where the statement is made that on grounds of public policy, apart from any express provisions in the policy, the representatives of an assured cannot recover, in the case of his death by felonious suicide, for the same reason that a life policy is not allowed to cover death at the hands of justice." The learned judge then proceeded to cite the decision of the House of Lords in *Fauntleroy's* case, and concluded, at p. 777, as follows:

"Decisions of Courts in the United States of America have been cited wherein incontestability clauses have not failed of their effect because of public policy. These cases not being binding on me, I prefer to follow the decisions of the English Courts, believing, as I do, that the principles relating to public policy as

* These cases were recently distinguished by the Court of King's Bench in Montreal in *La Fonciere Compagnie d'Assurance de France v. Perras et al.*, [1942] Que. K.B. 231, [1942] 4 D.L.R. 244, 9 I.L.R. 203, where, although the driver of the motor car had been convicted of an offence against s. 284 of The Criminal Code, the Court concluded on the facts that his fault was unintentional. This judgment was affirmed, [1943] S.C.R. 165, [1943] 2 D.L.R. 129, 10 I.L.R. 45. There are two decisions of English courts to the same effect: *Tinline v. White Cross Insurance Association, Limited*, [1921] 3 K.B. 327, and *James v. British General Insurance Company, Limited*, [1927] 2 K.B. 311.

enumerated and defined in the text and authorities above cited, and others to the same general effect, are still in force as law."

Fauntleroy's case has been followed and applied by the Supreme Court of the United States in several decisions, in circumstances closely analogous to the present case. In *Burt v. Union Central Life Insurance Company* (1902), 187 U.S. 362, the Court was called upon to decide the question whether an ordinary life policy was a binding contract to insure against the contingency of the insured's death by legal execution. There was nothing in the policy which in terms covered that contingency. The insured, having been indicted for the murder of his wife, the beneficiary under the policy, was tried and convicted, was sentenced to be put to death, and, pursuant to that sentence, was hanged. The action was brought by assignees of the assured to recover the proceeds of the policy. The Supreme Court of the United States (opinion of Mr. Justice Brewer), after citing the decision of the House of Lords in *Fauntleroy's* case, said, at pp. 365-6:

"There are some differences between that case and the present in the surrounding facts, but none that are material. There the policy was taken out for the benefit of the insured's estate. Here the beneficiary was the wife of the insured, or, if she should not be living at the time of his death, his estate. As her death preceded his, the conditions of the insurance became practically the same. In that case the insured had assigned all his interest in the policies upon certain trusts, though the plaintiffs were his assignees in bankruptcy. Here he and his wife, the original beneficiary, transferred a half interest to these plaintiffs, who were their creditors, but the amount of the indebtedness is not shown, and the policy provided 'should this policy be assigned or held as security, a duplicate of said assignment must be filed with the company, and due proofs of interest produced with proofs of death. This company does not guarantee the validity of any assignment;' a requirement which does not appear to have been complied with. So that the rights of the plaintiffs depend mainly if not wholly upon the fact of the assignment made by the insured after the killing of his wife and prior to his execution, and the further fact that they are his sole heirs. The plaintiffs therefore in each of the cases claimed directly under the insured and sought to recover on a policy obtained by him, the maturity of which was accelerated by his

execution for crime. In neither policy was there any express stipulation in respect of such a contingency, so that the reasoning of the Lord Chancellor is pertinent to this case, and it is reasoning the force of which it is impossible to avoid. It cannot be that one of the risks covered by a contract of insurance is the crime of the insured. There is an implied obligation on his part to do nothing to wrongfully accelerate the maturity of the policy. Public policy forbids the insertion in a contract of a condition which would tend to induce crime, and as it forbids the introduction of such a stipulation it also forbids the enforcement of a contract under circumstances which cannot be lawfully stipulated for."

In *Northwestern Mutual Life Insurance Company v. McCue et al.* (1912), 223 U.S. 234, the Supreme Court of the United States again held that a policy of life insurance, silent on the point, did not cover death by the hands of the law. The judgment of the Court, delivered by Mr. Justice McKenna, cites the earlier decision in *Burt's case*, *supra*, and other cases therein cited, and then says, at p. 246:

"These cases must be accepted as expressing the views of this court as to the public policy which must determine the validity of insurance policies, and which they cannot transcend even by explicit declaration, much less be held to transcend by omissions or implications, and we pass by, therefore, the very interesting argument of counsel for respondents as to the indefinite and variable notions which may be entertained of such policy according to times and places and the temperaments of courts, and the danger of permitting its uncertain conceptions to control or supersede the freedom of parties to make and to be bound by contracts deliberately made."

In *Prudential Ins. Co. of America v. Goldstein* (1942), 43 Fed. Supp. 767, a decision of the United States District Court, Eastern District of New York, it was held that public policy did not prevent recovery of the proceeds of a policy of life insurance on the life of one who had been executed for the crime of murder. The reasoning of the judgment is based mainly upon statutory provisions of the New York Insurance Act respecting the standard clauses of life insurance policies and accident and health insurance policies in that State. The decision, therefore, is of little value on the question now under discussion.

In my opinion, the principle of public policy enunciated in *Cleaver's* case, and of which *Fauntleroy's* case affords a particular illustration, is part of the law of the Province of Ontario; and bearing in mind the statement of Fry L.J. that "This principle of public policy, like all such principles, must be applied to all cases to which it can be applied without reference to the particular character of the right asserted or the form of its assertion" (*Cleaver's* case, *supra*, at p. 156), and that the plaintiff is a mere volunteer of the deceased insured and asserts her claim under or through him, I am of opinion that she is not entitled to succeed in this action, because the policy contracts upon which her action is founded are, in the circumstances of the case, unenforceable on grounds of public policy. The policy contracts are, as I have already observed, silent as to the contingency of the death of the insured by the hands of justice, and no express stipulation for payment in that event could, on the principle of public policy applied in *Fauntleroy's* case, have been lawfully inserted in the policy contracts: at any rate the courts would refuse to enforce such a stipulation; and no such stipulation can therefore be implied. The present case was, indeed, envisaged as an extreme example of the application of this principle of public policy by Lord Wright M.R. in the *Beresford* case ([1937] 2 K.B. at p. 209), when he said: "However absolute in terms the policy might be the Court will not enforce it if it is illegal or contrary to public policy or if it is otherwise such an agreement as the Court in its inherent jurisdiction will refuse to enforce. To take an extreme instance, the Court would not enforce a promise to pay a sum of money in consideration of the plaintiff having, according to contract, committed a murder."

It is, I think, not inappropriate for me to conclude this judgment with the following quotation from the judgment of Lord Mansfield in *Holman et al. v. Johnson, alias Newland* (1775), 1 Cowp. 341 at 342, 98 E.R. 1120: "The objection, that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. . . . It is upon

that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

The action is accordingly dismissed with costs.

Action dismissed with costs.

The plaintiff appealed from the above judgment.

9th June 1943. The appeal was heard by ROBERTSON C.J.O. and FISHER and KELLOCK JJ.A.

R. S. Mills, for the plaintiff, 'appellant: We are entitled to payment of the proceeds of these policies as designated beneficiary. The will is a sufficient designation under s. 153 of The Insurance Act, R.S.O. 1937, c. 256: *Re Wythe*, 60 O.L.R. 323, [1927] 2 D.L.R. 1161; *Phillips v. Joseph*, [1932] O.R. 589 at 597, [1932] 4 D.L.R. 261. While the Act defines "beneficiary for value", it does not define, though it refers to, "assignee for value". [ROBERTSON C.J.O.: There is no assignment here.]

As to the right of an ordinary beneficiary to sue, I refer to *Re Benjamin* (1926), 59 O.L.R. 392, which followed *In re Roddick* (1896), 27 O.R. 537; *Re Thomson*, [1940] O.W.N. 546, 22 C.B.R. 384, 8 I.L.R. 70; also ss. 172 and 176 of the Act.

As to public policy, the combined effect of ss. 129(1) and 134(1) of the Act give a situation not to be found in any other jurisdiction where similar questions have been decided. S. 129(1) contemplates that Part V of the Act shall constitute a complete code, and s. 134(1) excludes the idea of any implied terms. Each policy here is expressed to contain the entire contract.

The trial judge relied principally upon *Amicable Society for a Perpetual Assurance Office v. Bolland et al.* (*Fauntleroy's* case) (1830), 4 Bligh N.S. 194, 5 E.R. 70; *Beresford v. Royal Insurance Company, Limited*, [1938] A.C. 586, [1938] 2 All E.R. 602, and *Cleaver et al. v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147. While these cases were properly decided in England, they are not ruling authorities in Ontario at present. *Fauntleroy's* case was decided at a time when forfeiture followed conviction, which is not the case under s. 1013 of The Criminal Code, R.S.C. 1927, c. 36.

The American authorities referred to by the trial judge are before *Northwestern Mutual Life Insurance Company v. Johnson* (1920), 254 U.S. 96, where the Court took a different view. I refer also to *Weeks v. New York Life Ins. Co.* (1924), 122 S.E. 586; *Prudential Ins. Co. of America v. Goldstein* (1942), 43 Fed.

Supp. 767; *Collins v. The Metropolitan Life Insurance Co.* (1907), 232 Ill. 37 at 45.

The amendments to The Insurance Act by 1940, c. 11, s. 5 and 1942, c. 22, s. 5, show the change in the conception of public policy, as applied to contracts of insurance.

Had this insurer wished to exclude liability for death through legal execution, it should have inserted a term in the policy to that effect.

The rule of public policy should be carried no further than is absolutely required for the protection of the public: *Cleaver's* case, *supra*, at p. 147.

V. *Evan Gray, K.C.*, for the defendant, respondent: There are still outstanding whatever rights the personal representative of the deceased beneficiary may have in the policy.

The will contains no indication of an intention to make a declaration of beneficiary under s. 128(7) of the Act: *Re Hoare*, [1933] O.R. 474, [1933] 2 D.L.R. 780. This is a limitation on the decision in *Re Wythe*, *supra*, and the trial judge was wrong in holding that the will was a sufficient declaration; see also *In re Grindlay*, [1933] O.R. 28, [1933] 1 D.L.R. 318.

This point is important only if the defence of public policy does not succeed. It arises only because the plaintiff has attempted to establish some privity between herself and the insurer, which can circumvent the position of the insured, and exclude the doctrine of public policy. The law precludes that result. In any case the rule of public policy intervenes, because all the rights of the plaintiff arise only after the murder committed by the insured; even the insured's right to name a new beneficiary arose only because of the death of the preferred beneficiary by murder, and this right of designation is a benefit which cannot be permitted to result from the crime.

As to the rule of public policy, we rely on the reasons of the trial judge. The rule is not based upon any imagined inducement to crime. The principle is rather that the commission of a crime cannot be allowed to result in a benefit flowing to the criminal or his representatives.

We are not endeavouring to imply a term in the contract.

As to the American authorities, see the *Beresford* case, [1937] 2 K.B. at 218, and [1938] A.C. at 600, 605.

An ordinary beneficiary is not entitled to sue the insurer. This result is unavoidable if one examines the history of the

legislation, and the decided cases. *In re Roddick, supra*, and *Re Benjamin, supra*, are no longer good law. *Re Wythe, supra*, shows that the new Act is a completely new code.

R. S. Mills, in reply.

Cur. adv. vult.

30th June 1943. ROBERTSON C.J.O.:—I agree in the disposition of this appeal as proposed in the judgment of Kellock J.A., which I have had the privilege of reading. In my opinion the action fails on the ground of public policy.

The wife of the insured had been the beneficiary named by him under both policies. She was of the class of preferred beneficiaries, and on her designation as beneficiary a trust was created as provided by s. 156 of The Insurance Act (R.S.O. 1937, c. 256). It is plain that, to give effect to the disposition of the insurance moneys according to the terms of the assured's will, made while he awaited execution for the murder of his wife, would be to permit the increase of his estate as a result of his crime.

The brief dispositions of his will are as follows:—

"2. I direct payment of my just debts, funeral and testamentary expenses as soon as convenient after my decease.

"3. I give, devise and bequeath all my estate both real and personal including all policies of Insurance effected upon my life and including all chattels set forth in the list written out by me, unto my sister, Josephine Dechert, absolutely.

"4. I appoint my sister, Josephine Dechert to be the sole Executrix of this my will."

Very definitely the assured sought to dispose of, as part of his own estate, the insurance money that but for the murder by him of his wife, would have formed the subject-matter of a trust, and would not have been subject to the control of the insured, or of his creditors, or form part of his estate.

The appellant is personally free of any connection whatsoever with the crime, but her sole title to the insurance money must arise from this will. In my opinion, principles established by the cases cited in the able judgment of the learned trial judge prevent the Court from allowing her claim.

FISHER J.A. agrees with ROBERTSON C.J.O.

KELLOCK J.A.:—This is an appeal from the judgment of Plaxton J., dated 20th January 1943, after a trial without a jury, by which the action was dismissed.

The action was brought upon two policies of life insurance issued by the respondent upon the life of one Matthew, who was executed on 23rd January 1941, for the murder of his wife, the beneficiary under both policies. Subsequent to the murder, and while the deceased was awaiting execution, he executed a will dated 19th January 1941, which the appellant claims to be a declaration of herself as beneficiary.

The plaintiff sues in her personal capacity and as executrix of the deceased's will. The learned judge dismissed the action on the grounds that, although the will was a sufficient declaration to constitute the plaintiff the beneficiary, she, as an ordinary beneficiary, had no right to sue at all, and as executrix she was claiming under the deceased and the claim was unenforceable on the ground both of public policy and because in his view the event insured against did not include, as a matter of construction of the policies, the contingency of death for crime.

The learned judge said in his judgment that the conclusion at which he had arrived upon the main issue rendered it unnecessary for him to decide the question as to the right of the plaintiff to sue in her capacity of an ordinary beneficiary. Without deciding the point, I assume for the purposes of this judgment that the will was a sufficient declaration.

In my opinion public policy prohibits the enforcement of the contracts here in question, at the instance of the appellant as executrix or as beneficiary. The principle applicable is stated by Lord Atkin in *Beresford v. Royal Insurance Company, Limited*, [1938] A.C. 586 at 599, [1938] 2 All E.R. 602, as follows: " . . . the absolute rule is that the Courts will not recognize a benefit accruing to a criminal from his crime."

At the date of the crime here in question, the policies were payable to the murdered woman, the wife of the insured. By reason of the provisions of s. 160(4) of The Insurance Act, R.S.O. 1937, c. 256, the policies became payable to the estate of the husband. This brings the facts of this case clearly within what is also set forth by Lord Atkin in the course of the same judgment at p. 599: "I cannot think the principle of public policy to be so narrow as not to include the increase of the criminal's

estate amongst the benefits which he is deprived of by his crime. His executor or administrator claims as his representative, and, as his representative, falls under the same ban."

Were the situation otherwise, so as to permit the plaintiff to have a status to sue as beneficiary, the result in my opinion would be the same. Apart from s. 160(4), by s. 160(3) the proceeds of the policies became at the disposal of the husband on the death of his wife, and he purported to dispose thereof by will. To my mind, this situation, resulting from his crime, was equally a benefit accruing to the criminal from his crime and would prevent the beneficiary from enforcing the policies.

Mr. Mills contends that so to apply the principle of public policy to the policies in question is to imply a term or condition to that effect, and that so to do is to overlook the provisions of s. 139(1) of the Act. I do not find that the basis of any of the judgments in *Beresford's* case is that of implied term or condition. The decision is put upon the basis that the Court will not enforce the contract. In my opinion, the proper construction of s. 139, in any event, is to read it as subject to the application of the principle of public policy. I think the language of Clauson J., as he then was, in *In re Sigsworth; Bedford v. Bedford*, [1935] 1 Ch. 89 at 92, may be here employed: "The principle . . . must be so far regarded in the construction of Acts of Parliament that general words which might include cases obnoxious to the principle must be read and construed as subject to it."

I would dismiss the appeal with costs if demanded.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Graham, Graham & Bowyer, Brampton.

Solicitor for the defendant, respondent: V. Evan Gray, Toronto.

[ROACH J.]

Schoeni et al. v. King et al.

Nuisance—Failure to Take Proper Precautions on Land Adjoining Highway—Liability of Landowner for Nuisance Created by Independent Contractor—This Liability Distinguished from that for Negligence.

Where a mortar box is placed, with a sand-pile beside it, partly on a highway and partly on land adjacent to the highway, and proper precautions are not taken to prevent a child from falling into the mortar box and being injured, the box and sand together constitute a nuisance. *Crane v. South Suburban Gas Company*, [1916] 1 K.B. 33 at 36, applied. Where the nuisance is created, not by the owner, but by an independent contractor employed by him, the owner will be liable if he fails to abate it within a reasonable time after he knows, or should know, of its existence. *Barker v. Herbert*, [1911] 2 K.B. 633 at 642; *Sedleigh-Denfield v. O'Callaghan et al.*, [1940] A.C. 880 at 894, applied.

Had the box and sand not been held to constitute a nuisance, the landowner could not have been held liable, since one who employs a competent contractor to do work, itself lawful and not inherently dangerous, is not liable for an accident arising from the negligence of the contractor. *The City of St. John v. Donald*, [1926] S.C.R. 371 at 383, applied.

Municipal Corporations—Action for Damages Arising from Non-repair of Highway—Notice of Injury—Effect of Failure to Give Notice—Infant Plaintiff—The Municipal Act, R.S.O. 1937, c. 266, ss. 480 (as amended by 1939 (Ont.), c. 30, s. 33), 481.

The failure to give notice of an injury and claim, as required by s. 480(4) of The Municipal Act, R.S.O. 1937, c. 266, cannot be excused, and will be fatal to an action based upon that injury, at least in cases where the Court is unable to say on the evidence that the municipality has not been prejudiced in its defence. *Carmichael et al. v. The City of Edmonton*, [1933] S.C.R. 650, referred to. There seems to be no ground for holding that the subsection is inapplicable to an action by an infant plaintiff. *Fergus v. City of Toronto et al.*, [1932] O.R. 257; *Shaw et al. v. London County Council* (1934), 51 T.L.R. 16, considered.

AN action for damages for personal injuries suffered by the infant plaintiff, and for out-of-pocket expenses incurred by the adult plaintiff, father of the infant.

21st to 25th June 1943. The action was tried by ROACH J. without a jury at Toronto.

R. R. McMurtry, for the plaintiffs.

J. J. Robinette, for the individual defendants.

G. T. Walsh, K.C., and *A. J. Sneath*, for the Township of Etobicoke, defendant.

6th July 1943. ROACH J.:—The defendant King Brothers is a partnership, composed of two brothers. They owned a vacant lot on the west side of Strath Avenue in the township of Etobicoke, and commencing in the month of June 1942 a dwelling

was being constructed by them on this land. Early during the building operations a mortar box, for the mixing of mortar necessary in the masonry and brick work, was so placed that it rested partly on the land owned by King Brothers and partly on the public highway, known as Strath Avenue. There is a sidewalk on the west side of Strath Avenue. The mortar box was approximately 4 feet 6 inches in width and about 11 or 12 feet in length. It was of plank construction, and its height was the width of two planks, estimated at about 15 inches. The distance from the sidewalk to the west side of Strath Avenue is 10 feet, and over that area the land had a slight rise from the sidewalk to the property line. The mortar box protruded out over the property line at its south-east corner a distance of 6 feet, and at the north-east corner a distance slightly less than that, so that the south-east corner was 4 feet west of the sidewalk and the north-east corner was slightly further removed from the sidewalk. From time to time during the building operations, sand was trucked to the site and dumped on the south side of the mortar box and immediately adjacent to it. The size of the pile of sand varied from time to time, but at all times up to the injury sustained by the infant plaintiff the pile of sand, whatever its size, stood partly on the property owned by King Brothers and partly on the highway, extending out into the highway so far that the greater part of the time it covered at least a portion of the sidewalk. From the beginning, this pile of sand was an allurements to the infant plaintiff and other children in the neighbourhood, who came and played in and upon it. From time to time lime was slaked in the mortar box, preliminary to the mixing of the mortar necessary on the job. Lime is slaked by adding water to it and from the commencement of the slaking process it is hot, and retains its heat, according to the evidence, for at least an hour and a half. The adult plaintiff and his family resided in their dwelling, which stood on the west side of Strath Avenue and was in the neighbourhood of 200 feet south of the building which was in the course of construction. The infant plaintiff was born 30th May 1938, so that at the time of the building operations she was slightly more than four years of age. On many occasions prior to the date of the injuries received by her, she and the other children who were wont to play in and on the sand pile, were

chased from it by one of the King Brothers and workmen engaged in the building work, because of the obvious danger of their being injured, either by falling into the mortar box or otherwise. They would remain away for a little time and then return and be chased away again.

On 21st July, while hot lime was in the mortar box to a depth of about 5 inches, and at a time when no one was in the immediate proximity of the mortar box, the infant plaintiff fell into it and was badly burned, and now brings this action to recover damages for the injuries received by her, and, of course, the father's claim is for out-of-pocket expenses incurred by him as a result of his child's injuries. I think the conclusion that she actually fell into the box from the pile of sand is inescapable. No one actually saw her fall in and when she was heard to cry out she was seen standing in the box, but from the extent of her burns and the mortar on her clothing, without doubt she fell into the box, even though when first seen she was standing up in it. That she fell into it off the sand pile is, on the evidence, also a reasonable inference, because a moment or so after she was lifted from the box, a little wooden duck, to which was attached a little sand pail, was found on the pile of sand, and the string attached to it was dangling over the edge of the box and in the hot lime.

The first question for determination is into what part of the mortar box the infant plaintiff fell, the part on the highway or the part on the land owned and occupied by King Brothers, because it seems to me that the liability of the defendant corporation will depend—apart from statutory defences which it may have—upon the answer to that question. The preponderance of evidence is that she fell into that part of it which extended out into the highway, and I so find.

The mortar box was owned by one Cadorin, a masonry contractor who was working on the job. It had been placed in position by a labourer, one Smitani. Its position had never been altered. Smitani was an employee of Cadorin, paid wages at an hourly rate by Cadorin, and as such was subject to the orders of his employer. Cadorin paid the Workmen's Compensation fees in respect of him. Neither of the King Brothers was present when the box was put into position, but they knew shortly afterwards, and long before the accident occurred, where the

box stood, and made no protest. Investigation would have disclosed that the box projected out into the highway, although a casual observation would not have disclosed that fact. In my opinion, it was not present in anybody's mind that the box was actually partly on the highway.

I think I must find on the evidence that Cadorin was not a servant of King Brothers, but was an independent contractor. King Brothers had an oral agreement with him to perform or cause to be performed all the labour in connection with that part of the building which consisted of brick and masonry work, for the sum of \$350, King Brothers to supply all the material. Cadorin actually worked on the job, employing necessary helpers, including Smitani. King Brothers had no control over Cadorin, nor was he subject to their direction beyond their right to object to the quality or the description of the work done by him or those whom he employed. That is the test to be applied in determining whether he was an independent contractor. See *Saunders v. City of Toronto* (1899), 26 O.A.R. 265, and cases there cited.

In so far as the plaintiffs' claim against King Brothers is based on negligence, we start with the proposition that where the owner employs a competent contractor to do the work, the work itself being a lawful one and not intrinsically dangerous to anyone, and not being in the nature of a nuisance, he is not liable for an accident arising from the negligence of the contractor in carrying out his contract. That proposition is discussed at length by Anglin C.J.C. in *The City of St. John v. Donald*, [1926] S.C.R. 371 at 383, [1926] 2 D.L.R. 185. I am not prepared to hold that the work contracted to be performed by Cadorin was inherently dangerous. It must be presumed that King Brothers contracted with him to do that work with due care. Because it was not intrinsically dangerous, and because if executed with due care it would not cause injury to anyone, then no liability can attach to the employer due to negligent performance by the independent contractor.

In so far as the plaintiffs' claim is based on nuisance, different considerations apply. This box, containing hot lime and partly on the public highway and partly on the land adjacent thereto, constituted a public nuisance, the danger from which was aggravated by the pile of sand next to it. Indeed, consider-

ing this case from the standpoint of nuisance, I think the sand and the box together must be considered as a whole; the whole constituted the nuisance.

In *Crane v. South Suburban Gas Company*, [1916] 1 K.B. 33, Avory J., at p. 36, says:

"It is clear on the authorities that a person doing something on the highway or on land adjacent to it, which he may lawfully do if he takes proper precautions to guard the public from injury, is guilty in law of a nuisance if he fails to take proper precautions."

That was a case where workmen employed by the defendants, a gas company, for the purpose of carrying out repairs to a gas main in a highway, placed a fire pail, on which was a ladle containing molten lead, on unenclosed land adjacent to the highway. The plaintiff, a young child, was playing with other children near the fire, when a passer-by accidentally knocked over the fire pail, and the molten lead was spilled on the plaintiff, causing her injury.

Cadorin through his employee created the nuisance. The question now arises, does any liability attach to King Brothers, the owners and occupants of the land, by reason of that nuisance?

The occupant of property will be liable for a nuisance not created by him, and even though it has arisen without his own act or default, if he omits to remedy it within a reasonable time after he knows of its existence, or ought to have become aware of it.

In *Barker v. Herbert*, [1911] 2 K.B. 633, Fletcher Moulton L.J., at p. 642, states the law to be as follows:

" . . . that the possessor of land adjoining a highway may not cause his premises to be a nuisance to the highway, and he will be responsible in this respect for the acts of his agents or servants. It may be that, as indicated in certain cases, his responsibility may have a wider range than that, and he may sometimes be responsible for the acts of those whom he permits to be occupants of his premises. . . . In a case where the nuisance is created by the act of a trespasser, it is done without the permission of the owner and against his will, and he cannot in any sense be said to have caused the nuisance; but the law recognizes that there may be a continuance by him of the nuisance. In that

case the gravamen is the continuance of the nuisance, and not the original causing of it."

In *Job Edwards, Limited v. The Company of Proprietors of the Birmingham Navigations*, [1924] 1 K.B. 341, Bankes L.J., at p. 350, says:

"It is clear that in the case of a public nuisance, when once the existence of the nuisance upon his land becomes known to the occupier of the land, it is his duty to abate it, or to endeavour to abate it, even though he is entirely innocent of either causing the nuisance or of allowing it to continue."

In *Sedleigh-Denfield v. O'Callaghan et al.*, [1940] A.C. 880, Viscount Maugham, at p. 894, says:

"The statement that an occupier of land is liable for the continuance of a nuisance created by others, *e.g.*, by trespassers, if he continues or adopts it—which seems to be agreed—throws little light on the matter, unless the words 'continues or adopts' are defined. In my opinion an occupier of land 'continues' a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so. He 'adopts' it if he makes any use of the erection, building, bank or artificial contrivance which constitutes the nuisance. In these sentences I am not attempting exclusive definitions."

In the case at bar there was the nuisance on the property of the defendant King Brothers, and it also projected into the highway. It was not created by them or by anyone for whose acts they were responsible. They had ample time to remove it, or cause it to be removed. They did neither. They did not even object. They must be taken to have acquiesced in its existence. Their duty was to remove it. If it was essential to the building operations, the whole should have been removed to a safe distance from the highway so that it would no longer be a menace to persons using the highway. The very nature of the nuisance, that is to say the mortar box which was the component part in which the infant plaintiff was injured, was such that the abatement of the nuisance by the removal of the box would have also meant its removal from the highway. Had this been done, this unfortunate accident would not have occurred. For the failure of King Brothers to require it to be done they must stand the consequences.

As to the liability of the defendant corporation, the statutory defences pleaded by it must be considered.

The Municipal Act, R.S.O. 1937, c. 266, contains the following provisions:

S. 480: "(1) Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by this Act, and in case of default the corporation shall be subject to the provisions of *The Negligence Act* be liable for all damages sustained by any person by reason of such default."

"(4) No action shall be brought for the recovery of the damages mentioned in subsection 1 unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered post to the head or the clerk of the corporation, in the case of a county or township within ten days . . ."

"(5) In the case of the death of the person injured, failure to give notice shall not be a bar to the action and except where the injury was caused by snow or ice upon a sidewalk, failure to give or insufficiency of the notice shall not be a bar to the action, if the court or judge before whom the action is tried is of the opinion that the corporation in its defence was not prejudiced by the want or insufficiency of the notice and that to bar the action would be an injustice, notwithstanding that reasonable excuse for the want or insufficiency of the notice is not established."

S. 481: "The provisions of subsections 2 to 8 of section 480 shall apply to an action brought against a corporation for damages occasioned by the presence of any nuisance on a highway."

No notice of the plaintiffs' claim or of the injury complained of was given to the defendant corporation. The first knowledge any of its officials had of it was when the writ in this action was served on the clerk of the municipality on 23rd October, 1942. By that time all trace of the box had been removed. The building had, I take it, been completed. In any event the area around the house had been levelled off and sodded.

The plaintiffs did not attempt to justify the failure to give the statutory notice, but counsel for the plaintiffs argued that, notwithstanding the absence of reasonable excuse for such failure, the Court ought to hold that the action should not be barred because the corporation in its defence was not prejudiced by the

absence of notice, and that to bar the action would be an injustice.

Subs. 5 of s. 480 was enacted in 1936, and decisions in earlier cases are not particularly helpful. Notice within the prescribed time gives to a municipal corporation an opportunity to investigate the source of the accident, the place where it happened and the circumstances under which it happened. The greater the lapse of time between the happening of the occurrence and the investigation, the less is the opportunity of the servants of the corporation to investigate, and there may come a time when all opportunity to investigate is lost. I can understand a case in which the municipality had actual notice of the accident from sources other than the person injured, and thereby an opportunity to investigate—an opportunity which it seized upon notwithstanding the failure of the claimant to give such notice himself. In such a case, it might well be argued that failure to give the statutory notice did not prejudice the corporation in its defence. But that is not this case. Nor do I think that the Court can assume that all the evidence in a given case had been preserved, for example, as in this case, by photographs and surveys. The Court acts upon such evidence as is given before it, but by reason of the failure of the claimant to give the statutory notice, and the fact that the corporation did not otherwise have notice of the accident, it is deprived of the opportunity, by investigation, to challenge or test the statements later given in evidence on behalf of the claimant as to the place where, the time when, and the circumstances in which, the occurrence happened. In the case at bar the place where the occurrence happened is important, that is to say whether on or off the highway. Witnesses testified that it happened on the highway, but only a matter of a few feet past the property-line. The opportunity of those witnesses to observe the exact location depended upon the particular point from which they made their observations. By the time the municipality received notice, the whole picture had changed, and I cannot conclude that it has not been prejudiced in its defence. This subject is discussed fully in *Carmichael et al. v. The City of Edmonton*, [1933] S.C.R. 650, [1934] 1 D.L.R. 197.

Then it was argued that the obligation to give the statutory notice does not apply to infants, and for that proposition reliance

is placed on the judgment of Raney J. in *Fergus v. City of Toronto et al.*, [1932] O.R. 257, [1932] 2 D.L.R. 807. The infant plaintiff in that case was a boy ten years of age, who had been injured by the explosion of an oil drum, which was in a ditch on the side of the road, when he lighted or attempted to light a fire-cracker which he placed in or on this oil drum. No notice of the claim was given to the municipality. The statute at that time provided that failure to give the notice "shall not be a bar to the action if the court or judge before whom the action is tried is of the opinion that there is reasonable excuse" for the want of notice "and that the corporation was not thereby prejudiced in its defence." The learned judge held that the claim of the father for out-of-pocket expenses failed for lack of notice, and then, dealing with the claim of the infant, he continues, at p. 263, as follows:

"But the boy's claim is on a different footing. It is said to be a case of first instance in this court on the point of failure of an infant to give the statutory notice; but even the common law will not, I think, assume that a child of ten years knows the statute law. Moreover if the infant plaintiff here had been an adult, I think his case would have been within the authorities where it has been held that want of notice was excused. The city, through its servants, knew of the explosion and the injury the same day—at all events on the next juridical day—and there could be no serious contention that it was prejudiced in its defence by want of formal 'notice in writing of the claim and of the injury complained of.' "

Those words, I suppose, are capable of being interpreted as a definite pronouncement by that learned judge that an infant is not required to give the statutory notice, but it will be observed that he was not content, apparently, to put his judgment on that footing. He found as a fact that by reason of the nature and extent of the plaintiff's injuries, which almost proved fatal, he would have been, if an adult, excused from this failure to give notice.

Dillon on Municipal Corporations 5th ed., vol. 4, p. 2817, contains this statement:

"It is generally held, construing the statutes, that infants are not excepted from the operation of the statutes, and that the mere fact that the injured person is an infant is not sufficient to excuse failure to give the statutory notice."

In *Shaw et al. v. London County Council* (1934), 51 T.L.R. 16, the Court was called upon to consider a provision in The Public Authorities Protection Act, 1893, as it might or might not be applicable to claims by infants. The statute provided that "The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in the case of the continuance of injury or damage, within six months next after the ceasing thereof".

On the trial of the preliminary point of law, *viz.*, whether the statute applied in actions brought by infants, it was held that the wording of the Act was absolute, and that no exception was made with regard to infants. An appeal from this decision was dismissed. The logic of the judgments in appeal in that case seems to me to be compelling. Applying that logic to the construction of the section in The Municipal Act with respect to notice, it seems to me that had the Legislature intended that that section should not be applicable to infants, such an exception would have been so expressed in the statute, just as exceptions are found in other statutes for the benefit of infants and other persons under disability; for example the Statute of Limitations.

In my opinion the failure to give the statutory notice is a bar to the action against the defendant municipality.

S. 33 of The Municipal Amendment Act, 1939 (Ont.), c. 30, amended s. 480 of The Municipal Act by adding thereto the following subsection:—

"(2a) No action shall be brought against a corporation for the recovery of damages caused by the presence or absence or insufficiency of any wall, fence, guard rail, railing or barrier, or caused by or on account of any construction, obstruction or erection or any situation, arrangement or disposition of any earth, rock, tree or other material or object adjacent to or in, along or upon any highway or any part thereof not within the travelled portion of such highway."

This section has been pleaded by the defendant corporation.

It has been argued that in certain circumstances this is harsh legislation. Be that as it may, I think it is a further bar to the plaintiff's claim. This section was considered in the case of *Jacob v. The Town of Tilbury*, [1940] O.W.N. 367 and

530, [1941] 1 D.L.R. 456, but the obstruction there under consideration came under the heading of a fence or barrier.

In the case at bar the sand and box, in my opinion, came within the scope of the words in the amendment, "any construction, obstruction, or erection or any situation, arrangement or disposition of any earth, rock, tree or other material or object", and the particular part of the obstruction which caused the injury was not within the travelled portion of the highway.

This action, therefore, as against the defendant corporation is barred by statute.

As to damages, the infant plaintiff's injuries were serious and there was little, if any, conflict in evidence between the medical experts called on behalf of the plaintiff and the expert called on behalf of the defendants. Over three-quarters of the surface area of the infant plaintiff's right leg was burned, a third degree burn, that is to say, the full thickness of the skin was destroyed right down to the underlying tissues. As a matter of fact the burn penetrated into the tissues but not deep enough to affect the coverings of the muscles. The burn extended up into the buttock, but in that area it was only a first or second degree burn. The burn on the left leg was less serious and less extensive. It was mostly below the knee. The total surface of all the burns was about 25 per cent. of the whole area of skin of the whole body. Two skin-grafting operations were performed, one on 3rd October, the other on 24th October, in each of which two patches were applied to the right leg. The skin-grafting operations have been successful, but keloids formed and are greater in size and more pronounced in appearance than the surgeon in charge had anticipated. There is a deformity in the right leg, not of the muscles, but consisting of a variation in the normal contour of the calf of the leg. There are varying areas of colour changes and ridges and holes, the latter being caused to a very large extent by the keloid formation. The parents of the child state that they have observed the child scratching the areas where the keloids have developed, and the medical evidence is that this is quite to be expected, due to the fact, not easily explained, that these areas become itchy and in that sense annoying. These keloids and the variation in the contour of the leg are visible through silk stockings. Fortunately there has been no limitation in the movement of any of the joints, and the child is able to run and romp and play as any normal

child does. It is not suggested that her future earning power has been affected. It is obvious, of course, there will be certain pursuits in life which she could not follow; those who follow such pursuits are few. If these keloids should develop further it may be that a surgical operation, by which they would be excised, should be performed. Time alone can tell whether this will be necessary or not. The child was in the hospital from the day of the accident until 16th November, when she was returned to her home. It was necessary to return to the hospital again on 27th November, and she was finally discharged on 19th December. She unquestionably suffered pain and discomfort, although the medical men stated that by the administration of sedatives this pain and discomfort was minimized. Using my best judgment, in all the circumstances, I assess the damages of the infant plaintiff at the sum of \$3,500.

As to the adult plaintiff, there can be no controversy as to his damages. His out-of-pocket expenses, including those not already paid but for which he is liable, amount to \$1,285.

At the opening of the trial, counsel for the plaintiffs stated that he was abandoning his claim against the defendants Mabel H. King and Ethel M. King, explaining that they were originally added as defendants because of some mistaken information that they had some interest in the property upon which the building was being constructed. These defendants had appeared by a separate solicitor, although their statements of defence are almost word for word identical with the statement of defence of King Brothers. I think there was no necessity for severance of their defence from that of King Brothers.

In the result there shall be judgment as follows:

1. For the infant plaintiff against the defendant King Brothers for the sum of \$3,500;

2. For the adult plaintiff against King Brothers in the sum of \$1,285;

3. The plaintiffs shall have their costs of the action as against the defendant King Brothers from King Brothers.

4. The action as against the defendants Mabel H. King and Ethel M. King shall be dismissed without costs.

5. The action against the defendant the Corporation of the Township of Etobicoke is dismissed with costs.

In the third party proceedings, the defendant corporation claimed indemnity and contribution from the third parties. In

the view I have taken of the claim as against the defendant corporation, that corporation does not require the relief sought in the third party proceedings. Accordingly its claim in the third party proceedings is dismissed without costs.

Judgment accordingly.

Solicitors for the plaintiffs: Farrell, Squires & Gauld, Toronto.

Solicitor for the defendants Mabel H. King and Ethel M. King: Ross Kennedy, Toronto.

Solicitors for the defendant King Brothers: Rowan & Robinette, Toronto.

Solicitor for the defendant Township of Etobicoke: A. J. Sneath, Toronto.

[HOPE J.]

Big Point Club v. Lozon et al.

Highways—Rights as to Road Allowances Not Opened up—Effect of Enclosure by Adjoining Owner—Permission by Municipal Authorities to Hunt on Unopened Road Allowance—Effect and Limits of Permit—The Municipal Act, R.S.O. 1937, c. 266, s. 497(1).

A road allowance, once laid out, remains as such until it is extinguished by the appropriate procedure; it will not be destroyed by being enclosed by the adjoining owner with his own land, by non-user, or by the municipality's failure to open it. *Nash v. Glover* (1876), 24 Gr. 219, agreed with. The municipality is owner of the land so set aside, in trust for all persons having occasion to use it for lawful purposes of access or egress. *In re J. F. Brown Co. Limited and City of Toronto* (1916), 36 O.L.R. 189, affirmed 55 S.C.R. 153, applied. But in the absence of express statutory authority, it would appear to have no right to use it, or to permit its use, for any purpose which would interfere with or obstruct this primary purpose. *Code v. Jones and Town of Perth* (1923), 54 O.L.R. 425, referred to. The essential right of the public is a right to travel over the road allowance. *Re Sanderson and Township of Sophiasburg* (1916), 38 O.L.R. 249; *Hydro-Electric Power Commission of Ontario v. County of Grey* (1924), 55 O.L.R. 339, applied. It is doubtful whether the municipality is entitled to issue a permit to use the road allowance for any other purpose, and such a permit will be no defence if the permit-holder, in addition to going upon the road allowance to hunt or shoot, in fact goes beyond it, and trespasses upon adjoining land, privately owned. *McLean v. Crown Tailoring Co.* (1913), 29 O.L.R. 455; *Rice Lake Fur Co. Ltd. v. McAllister* (1925), 56 O.L.R. 440, applied.

Trespass—What Constitutes—Shooting over and upon Land.

Where a person, being upon a public highway or road allowance, shoots over privately owned land, in such manner that shots pass over, and fall upon, that land, he commits a trespass.

Waters and Watercourses—Nature of Marsh Land—Effect of Constructing Drainage Works.

Discussion of the nature of marsh land (*Pamment v. Thompson* (1921), 20 O.W.N. 89; *Merritt v. City of Toronto* (1912), 27 O.L.R. 1, referred to), and of the effect of constructing, across it, projects designed to drain land farther away from the shore of a lake.

AN action for damages, and for an injunction to restrain further acts of trespass by the defendants. The facts are fully stated in the judgment.

20th and 21st April 1943. The action was tried by HOPE J. without a jury at Chatham.

A. L. G. Brooks, K.C., and R. D. Steele, for the plaintiff.

S. B. Arnold and C. P. Arnold, for the defendants.

7th July 1943. HOPE J.:—The plaintiff is a club incorporated by letters patent of the Province of Ontario in 1909 and letters patent supplementary thereto in 1914, as a game preserve with authority to hold lands for the purpose of hunting, fishing, trapping and farming.

The defendants are a number of young farmers and farmers' sons residing in the township of Dover in the county of Kent, in close proximity to the property hereinafter described, owned by the said club.

The club is the owner of the north-west half of broken lot number 1, the north-west half of lot number 2, and the north-west half of lot number 3 and a further twenty-nine acres forming a point of land extending to the south-west of broken lot number 1, all in the eighth concession of the township of Dover in the county of Kent; broken lot number 1, all of lots numbers 2, 3, and 4 in the ninth concession of the said township; broken lots numbers 2 and 3 and all of lots numbers 4 and 5 and the north-west half of lot number 6 in the tenth concession of the said township; broken lots numbers 3 and 4 and all of lots numbers 5, 6 and 7 in the eleventh concession of the said township and broken lots numbers 4, 5, 6 and 7 in the twelfth concession of the said township, and also a water lot formed by an inlet or bay extending from the waters of Lake St. Clair into and across the north-west half of lots numbers 1 in the eighth and ninth concessions of the township of Dover.

The original grants from the Crown to divers patentees to whom the plaintiff is the successor in title (save the last-named parcel) are grants in fee simple "Saving, excepting and reserving [to the Crown] the free use, passage and enjoyment of, in, over and upon all navigable waters which shall or may hereafter be found on or under, or be flowing through or upon any part of the said [lands]".

In two of the patents there appears the following: "Reserving free access to the shore of Lake St. Clair for all vessels, boats and persons".

The original patent of the forty-five acres being part of St. Luke's Bay, reads as follows: "the Tract of Land and land covered with water . . . being composed of Marsh Land adjoining Lots Numbers One in the Eighth and Ninth concessions . . . being composed of the Northerly part of St. Luke's Bay (part of the waters of Lake St. Clair) adjoining Lots One in the Eighth and Ninth Concessions of the said Township".

Much of the land so held by the plaintiff, including the last named grant, is marsh land. As was stated by Meredith C.J.C.P. in *Pamment v. Thompson* (1921), 20 O.W.N. 89, "'Marsh' is a term which every one quite well understands. Marshes are

everywhere, and the legal rights in respect of them have been dealt with so that there can be no doubt about the law", and he refers to *Merritt v. City of Toronto* (1912), 27 O.L.R. 1, 6 D.L.R. 152, affirmed 48 S.C.R. 1, 12 D.L.R. 734.

In the original survey of the township, evidence of which has been filed, it would appear that the road allowances between concessions eight and nine, nine and ten, ten and eleven, and eleven and twelve were laid out to the shore line of Lake St. Clair. These road allowances, abutting much of the plaintiff's property, have not been opened or used. No public work or money has been expended upon them, and, contiguous to the marsh land in particular, they have, according to the evidence which I accept, been fenced and enclosed together with the plaintiff's lands abutting them.

The road allowances through this marsh area are largely covered with water or heavy marsh growth. There is no natural navigable watercourse flowing from the township to the east through the marsh land into Lake St. Clair. During the past number of years a number of drains, namely, the Toulouse drain, the Myers drain, the Hebert drain, the Boyle drain and the Hind Relief drain have all been constructed as municipal projects for the drainage of lands to the east, and have been carried through the plaintiff's property finding their outlet in the marsh lands hereinbefore referred to.

Cuts to the west of the marsh land through a strip of higher land along the lake shore have also been made as indicated on Ex. 15, namely, Meyers Cut, Maraw Cut and Hind Drain Cut. These cuts provide added drainage outlets from the marsh to the lake.

In the construction of some of the said drains, dredging machinery was brought to the site of the work from Lake St. Clair by taking the same through the marsh and thus in part dredging or wearing down a channel through the marsh. It would seem to be clear from all of the surveyors' evidence, including old plans which have been filed, that the shore line of Lake St. Clair, by both the original survey of 1810 and the re-survey of 1932, is shown well to the west or south-west of the lands granted to the plaintiff's predecessors in title, the only inlet affecting the lands owned by the plaintiff being the water lot sometimes referred to as St. Luke's Bay, but which water lot was the forty-five acre parcel of marsh land granted by the Crown to the plaintiff or

its predecessor in title as hereinbefore set out. The waters in the marsh, partly open and partly reeded, vary in depth from season to season, but approximate a mean depth of 33 inches. The level of the water rises and falls from time to time as the prevailing wind in Lake St. Clair may be on or off shore.

I think it can be clearly taken for granted on the evidence that the defendants admit the plaintiff's title to the patented lands in question and make no claim whatsoever to any right to shoot or hunt or otherwise trespass thereon, save to the extent that the defendants claim that the channels crossing the marsh by reason of the construction of the various drainage schemes, and extending through the cuts to the shore of Lake St. Clair, are navigable waters.

I have no difficulty on the evidence before me in finding that the waters covering the plaintiff's property do not in any way fall within the category of navigable streams, giving to the public any right of thoroughfare thereon: *vide Ross v. The Village of Portsmouth* (1866), 17 U.C.C.P. 195, in which it was held that a grant of land would carry land covered with water. In that case, the evidence shewed that the portion of the grant in dispute, at extraordinary periods when the water of the lake was pressed up at this particular part of it by strong winds, admitted of scows passing over it, but that the water was not then more than four or five feet deep, and that at ordinary times it was quite shallow and fordable. It was held that in such circumstances the water was not navigable.

Also in *Twin City Ice Co. v. City of Ottawa* (1915), 34 O.L.R. 358, 24 D.L.R. 873, it was held that the action failed because, the stream being regarded as unnavigable, it was not a highway and there was no right of passage over it.

The defendants, however, severally and together have at divers times during the past few years, and in particular in the month of October 1942, entered upon the plaintiff's lands, and more particularly have constructed "hides" on or about the road allowances between concessions eight and nine and ten and eleven, and from such "hides" they have shot duck. While admitting this fact, the defendants vigorously deny that they at any time shot duck over or upon the lands of the plaintiff, but say that with great self-discipline and restraint they confined all of their shooting to duck which were solely upon the waters covering the road allowances in question, or in the air directly

over the road allowances. Even when the duck were in flight, the defendants so rigorously observed and respected the plaintiff's property rights that they would abstain from shooting at any duck which might fall beyond the imaginary line separating the undefined road allowance from the lands of the plaintiff. In fact, if the evidence of the various defendants is to be accepted (and may I say that acceptance of it would strain one's credulity), these defendants in their duck-hunting activities displayed such self-restraint and self-disciplined control as might well be the envy of, and would in fact be almost unparalleled in, even the most seasoned members of the armed forces. In fact, while using dogs to retrieve birds which were brought down, the defendants, according to their testimony, did not even permit such dogs to pass the undefined boundary and enter the plaintiff's lands for the purpose of retrieving the result of an expert shot.

There was evidence, which I accept, that shots which passed over and lighted upon lands owned by the plaintiff, were fired by the defendants or some of them.

The facts herein are therefore comparatively simple and are not particularly controversial as between the parties.

The plaintiff has, pursuant to the provisions of s. 65 of The Game and Fisheries Act, R.S.O. 1937, c. 353, posted the lands with "No trespassing" signs. I am of the opinion that such posting was adequate to bring the prohibition to the attention of the defendants. But even were it not so considered, it was also proved, and, I believe, in the case of all individual defendants, admitted, that the plaintiff caused registered notices to be sent to the individual defendants pursuant to The Game and Fisheries Act, notifying the defendants not to hunt, fish or shoot on the lands in the possession of the plaintiff.

The defendants, or some of them, claimed to have obtained leave by a special permit, copies of which were filed, from the Township Constable, permitting them to shoot upon the road allowances. However, the municipal by-law in question, under which such licences were issued, was repealed. In any event, in my opinion, such could not be relied upon by the defendants for the purposes of their defence to this action.

Ownership of highways is held by municipalities in trust for all such of the King's subjects as have occasion to make use of them for purposes of communication or for other lawful pur-

pose, or in order to gain access to or egress from adjacent lands: *In re J. F. Brown Co. Limited and City of Toronto* (1916), 36 O.L.R. 189, 29 D.L.R. 618, affirmed 55 S.C.R. 153, 37 D.L.R. 532.

In the absence of express statutory authority, a municipality would appear to have no right to use, or to permit the user of, a highway, for any purpose which would substantially interfere with, or obstruct, its primary use for such purposes: *Code v. Jones and Town of Perth* (1923), 54 O.L.R. 425.

On the more or less agreed facts, this action resolves itself into a question as to whether or not the defendants have the right to hunt and shoot at the points in question, by reason of the fact, if their claim is accepted, that they were so hunting and shooting upon an original road allowance.

The only relevant finding of fact incumbent upon me is that I do find that the plaintiff had enclosed, at the edges of the marsh, the road allowances in question.

"Road allowances are strips of Crown land reserved from public sale and settlement. They were reserved originally for the sole purpose of making roads when and as roads might be required". *The King v. Alberta Railway and Irrigation Co.*, [1912] A.C. 827, 7 D.L.R. 513, C.R. [1912] 2 A.C. 140.

"A piece of land, marked out in the original plan of a township, as an allowance for road, does not lose that character, because it has never been used as a road for a period of forty years": Per Robinson C.J. in *Badgely v. Bender* (1834), 3 O.S. 221, applied in *Niagara Navigation Co. v. Town of Niagara* (1914), 31 O.L.R. 17 at 40.

I quite agree with the counsel for the defendant when he relies on *Nash v. Glover* (1876), 24 Gr. 219, which holds that an original road allowance cannot be extinguished except by the appropriate procedure under the Act; that a grant even by the Crown cannot extinguish it; and that the right of the public remains *in perpetuum*: though it may lie dormant, it may be revived, until steps under the Act have killed it.

Similarly, when he cited, as authority, *Boyd C. in Ricketts et al. v. The Village of Markdale* (1900), 31 O.R. 610 at 614: "When the course of legislation is regarded, it becomes manifest that while the primary purpose of the highway is for public travel and passage, yet there are many other modes of user which are recognized as permissible and legitimate, so long as public convenience is not interfered with".

In the same case, at p. 628, Robertson J. said: "The highway is *pro bono publico*, and so long as it is not obstructed unduly by the person using it, that person . . . has a right to such uses".

But I believe it must be recognized that as stated by Meredith C.J.C.P. in *Re Sanderson and Township of Sophiasburg* (1916), 38 O.L.R. 249 at 254, 33 D.L.R. 452: " . . . the highest right in highways is the right of the public to travel over them", or as otherwise expressed by Masten J.A. in *Hydro-Electric Power Commission of Ontario v. County of Grey* (1924), 55 O.L.R. 339 at 344: " . . . the right of the public to free passage along the King's highway is paramount and cannot be interfered with even by the Crown itself".

The plaintiff, as earlier stated, relies upon possession of the road allowance, not as against the Crown, but as against all others. I doubt if the plaintiff can, however, so rely by virtue of the provisions of s. 497(1) of The Municipal Act, R.S.O. 1937, c. 266, which provides:

"A person in possession of and having enclosed with a lawful fence that part of an original allowance for *road upon which his land abuts* which has not been opened for public use by reason of another road being used in lieu of it or of another road parallel or near to it having been established by law in lieu of it shall as against every person except the corporation . . . be deemed to be legally possessed of such part until a by-law has been passed by such council for opening it". (The italics are mine.)

Evidence was received that there is a forced road known as "Ticky-Tacky Road", shown on Ex. 3, but there is no evidence which indicates that this road was in lieu of the concession road allowances in question herein. If this were established the plaintiff could, with confidence, rely upon the statutory authority in its exclusion of the defendants from the road allowances.

However the plaintiff also relies on its physical possession, evidenced by its enclosure of the road allowances by fences. While I accept as a fact the sufficiency of the enclosure, does the fact give any paramount rights to the plaintiff? The general rule as to possessory title is laid down in 10 C.E.D. (Ont.), p. 632, on the authority of *Eastern Construction Company, Limited v. National Trust Company, Limited et al.* [1914] A.C. 197, 15 D.L.R. 755, *viz.*: "As against a wrongdoer, a plaintiff needs to show possession only; and the fact that he has obtained such

possession by his own trespass and has no other title is no defence to his action. The defendant is not allowed to justify his own wrong by showing the plaintiff's wrong, and he is not allowed to question the title of the plaintiff in possession unless he connects himself with the true title".

The question of the acquisition of possessory rights to Crown property has been discussed in various judgments.

In *Boulton, et al. v. Shand* (1852-3), 10 U.C.Q.B. 351, it was held by the Court of Appeal that in an action for trespass, the plaintiffs are entitled to succeed when they show themselves to have been peaceably in possession when the act complained of was committed, and when the defendant shows no better right, either in himself or in some person under whose authority he entered. The existence of a better right in a stranger, between whom and the defendant there was no privity, would signify nothing; nor is any apparent defect in the plaintiff's title any objection to his recovery.

But it is stated in *Anon.* (1588), 4 Leon. 184; 74 E.R. 809, per Anderson C.J.: "... if one intrude upon the possession of the King, and another man entreth upon him, that he shall not have an action of trespass for that entry, for that he who is to have and maintain trespass, ought to have a possession; but in such case he hath not a possession, for every intruder shall answer to the King for his whole time, and every intrusion supposeth the possession to be in the King".

Again in *Johnson v. Barret & Auters* (1647), Aleyn 10, 82 E.R. 887, the following is stated: "It was likewise agreed, that an intruder upon the King's possession might have an action of trespass against a stranger; but he could not make a lease, whereupon the lessee might maintain an *ejectione firmæ*".

Even if the defendants had been using the unopened road allowances only for travel to and from the shores of Lake St. Clair, there are authorities, such as *The King v. MacArthur* (1904), 34 S.C.R. 570, that if a man has, as a member of a community, one of two ways left, he cannot complain specially if the other is closed; his inconvenience is common to the public; *vide Chiswell v. Rural Municipality of Charleswood and Alcrest Golf Club Limited*, 44 Man. R. 469, [1936] 4 D.L.R. 575, varied 44 Man. R. at 479, [1937] 1 W.W.R. 177, [1937] 1 D.L.R. 776.

The defendants herein had other roads available for access to and from Lake St. Clair. On the evidence I have grave doubt

if the defendants ever really made use of the road allowances in question solely for such purposes.

Their interest and use of such road allowances were confined to the matter of duck hunting, which, in my opinion, cannot in the circumstances herein be considered a reasonable user. The law applicable thereto was considered in the following cases:

In *McLean v. Crown Tailoring Co.* (1913), 29 O.L.R. 455, at 458, 15 D.L.R. 353, Meredith C.J.O. quoted Lord Esher M.R. in *Harrison v. Duke of Rutland et al.*, [1893] 1 Q.B. 142 at 146-7, as follows: "Highways are, no doubt, dedicated *primâ facie* for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think he will be a trespasser".

In *Fritz v. Hobson* (1880), 14 Ch. D. 542 at 552 it was pointed out that the question was whether the user of the road "was, having regard to all the circumstances of the case, reasonable".

In *Rice Lake Fur Co. Ltd. v. McAllister* (1925), 56 O.L.R. 440 at 449, [1925] 2 D.L.R. 506, Mulock C.J.O., speaking of the use of navigable water as a highway said: "Where, naturally or by artificial means, water covering the land of a private owner is navigable, a stranger, whether he has or has not the right of navigation in such water, is not entitled, under the guise of using the water for navigation purposes, to hunt, shoot, or fish within the precincts of such private property. Such is the right of the owner of the land; *cujus est solum ejus est usque ad coelum*; *Fitzhardinge (Lord) v. Purcell*, [1908] 2 Ch. 139".

Even assuming for the moment that the setting up of "hides" on the unopened road allowances and the shooting therefrom were to be considered a reasonable user, then, in the light of my finding of fact that the defendants did shoot upon and over the plaintiff's property adjoining the road allowances, I am of opinion that the defendants should be restrained. In that connection I refer to the two following decisions:

Pickering v. Rudd (1815), 4 Camp. 219, 171 E.R. 70, in which Lord Ellenborough C.J. said: "I once had occasion to rule upon the circuit that a man who, from the outside of a field, discharged a gun into it, so as that the shot must have struck the soil, was guilty of breaking and entering it. A very learned Judge, who went the circuit with me, at first doubted the de-

cision, but I believe he afterwards approved of it, and that it met with the general concurrence of those to whom it was mentioned. But I am by no means prepared to say, that firing across a field *in vacuo*, no part of the contents touching it, amounts to a *clausum fregit*". And *Carrington v. Taylor* (1809), 11 East 571, 103 E.R. 1126, which held (headnote): "Firing at wild-fowl to kill and make profit of them, by one who was at the time in a boat on a public river or open creek, where the tide ebbs and flows, so near to an ancient decoy on the shore (about 200 yards) as to make the birds there take flight; the defendant having before fired at a greater distance from the decoy, which brought out some of the birds from thence; though he did not fire into the decoy pond; is evidence of a wilful disturbance of and of damage to the decoy, for which an action on the case is maintainable by the owner".

An interim injunction was granted herein by Roach J. In my opinion, this injunction should be continued in accordance with the plaintiff's prayer, since the defendants have been insistent in their claim, and in actions which, in my opinion, are violations of the plaintiff's rights.

While the plaintiff is of right entitled to damages, it is my opinion that in the circumstances herein there should be no order with respect thereto.

Judgment accordingly, with costs to the plaintiff.

Judgment for injunction and costs.

Solicitors for the plaintiff: German, Brooks & Cromarty, Welland.

Solicitors for the defendants: Arnold & Arnold, Chatham.

[COURT OF APPEAL.]

Rex ex rel. Tolfree v. Clark et al.

Quo Warranto—When Available—Usurpation of “Office or Franchise”—Membership in Legislative Assembly—Necessary Preliminaries—Leave of Court—Recognizance—The Judicature Act, R.S.O. 1937, c. 100, s. 141.

S. 141 of The Judicature Act, R.S.O. 1937, c. 100, is procedural only, and merely substitutes proceedings by originating notice of motion for the old writ of *quo warranto* or an information in the nature of *quo warranto*; such proceedings can still be taken only in the same cases, and subject to the same conditions, as the older remedies. The statute of 1692, 4 & 5 W. & M., c. 18, which is a part of the law of Ontario, requires a private individual, before taking proceedings in the nature of *quo warranto*, both to furnish security and to obtain the leave of the Court, and the necessity for leave before instituting such proceedings still remains. If proceedings are taken without leave, and it appears that leave should properly be given, the Court may stay proceedings pending an application for leave, but if the circumstances are such that leave should not be given, the proceedings will be struck out. Leave will not be given as of course, but only in the exercise of a sound discretion, upon the particular circumstances of the case.

Membership in a Legislative Assembly is not an “office or franchise”, the right to which can be tested in *quo warranto* proceedings. A member of such an Assembly holds a “seat”, and may be appointed to some office in the body, but his position is not such as arises by virtue of charter or Act of Parliament, within the meaning and intention of the law. *Rex v. Speyer*; *Rex v. Cassel*, [1916] 1 K.B. 595, considered.

Courts—Inherent Powers—Preventing Abuse of Proceedings—Rule 124.

There can be no doubt that the Court has ample jurisdiction to make an order striking out proceedings as frivolous and vexatious, and disclosing no reasonable cause of action. The power should be exercised with great care, and only in cases where it is clear that a continuation of the proceedings would be an abuse of procedure; if, however, the necessary conditions are present, it would be improper to permit the proceedings to be maintained. They should be struck out if relief is sought which the Court is powerless to grant, or if the applicant lacks the status or authority necessary to pursue the remedy. This result should follow equally where the proceedings are instituted by an originating notice of motion as where they are commenced by writ of summons.

Constitutional Law—Powers of Provincial Legislatures—Amendment of Constitution—Extension of Term of Existing Legislature—The British North America Act, ss. 85, 92(1)—The Legislative Assembly Act, R.S.O. 1937, c. 12, s. 3—The Legislative Assembly Extension Act, 1942 (Ont.), c. 24.

Per Riddell J.A.: The Legislative Assembly Extension Act, 1942 (Ont.), c. 24, is *intra vires*, notwithstanding s. 85 of The British North America Act. It is within s. 92(1) of that Act, as an amendment of the constitution of the Province, which in no way affects the office of Lieutenant-Governor. (Henderson J.A. inclined toward this view; the other members of the Court refrained from expressing any opinion on this question).

AN appeal by the relator from the order of Hope J., [1943] O.R. 319, [1943] 2 D.L.R. 554, dismissing the proceedings (by originating notice in the nature of *quo warranto*) as frivolous

and vexatious and disclosing no reasonable cause of action. The facts are fully stated in the report of the proceedings below, and in the judgment of LAIDLAW J.A.

13th and 14th May 1943. The appeal was heard by Riddell, Fisher, Henderson, Gillanders and Laidlaw JJ.A.

V. Evan Gray, K.C. (*W. A. Toogood* with him), for the relator, appellant: Four questions are in issue in this appeal, as follows:

A. Has the Ontario Legislature power to extend the duration of the Assembly beyond the four years fixed by s. 85 of The British North America Act, or the five years fixed by s. 3 of The Legislative Assembly Act, R.S.O. 1937, c. 12?

B. Is the present proceeding in the nature of *quo warranto* competent to test the legality of the existence of a *de facto* Legislative Assembly?

C. Was the learned judge below right in assuming jurisdiction to stay proceedings brought by originating notice before the return of the motion?

D. Was the judge below right in setting aside the subpoena issued to the Clerk of the Assembly and Chief Election Officer?

A. and B. These questions must be argued together, because they are interlocking, and B can only be determined when A is fully understood.

The duration of the 20th Legislative Assembly expired in October 1941 if effect is given to s. 85 of The British North America Act, or in October 1942 under the Legislative Assembly Act. Nevertheless, a *de facto* session of the same Assembly has been held in 1943, in which the respondents participated as if their term of office had not expired. The respondents are respectively the Speaker of the Assembly and the leaders of the government and of the opposition. They claim that their acts as Assemblymen are rendered lawful by The Legislative Assembly Extension Act, 1942 (Ont.), c. 24, which extended the life of the Assembly. The relator, on behalf of his Majesty, seeks a determination by this Court of the validity of that enactment. This proceeding, in the nature of *quo warranto*, is brought pursuant to s. 141 of The Judicature Act, R.S.O. 1937, c. 100, and is the appropriate and only available means of determining the question. No other form of action is available to the relator, because his interest is merely the common interest of all citizens.

S. 85 of The British North America Act is unrepealed and unamended. The 1942 Act contradicts, but does not amend, it. S. 92(1) does not include, either by express words or by necessary intendment, a power to change s. 85. The meaning and scope of the words "The Amendment . . . of the Constitution of the Province" must be gathered from the Act itself. I refer particularly to ss. 3, 5, 6, 9, 12, 15, 20, 38, 50, 55, 56, 57, 58, 59, 60, 61, 63, 65, 66, 69, 80, 81, 82, 85, 86, 89, 91, 92, 128, 129. It is plain that the words must be given a restricted interpretation, which cannot include the subject-matter of s. 85: *Rex ex rel. Brooks v. Ulmer*, 19 Alta. L.R. 12, [1923] 1 D.L.R. 304, 38 C.C.C. 207, [1923] 1 W.W.R. 1; *In re The Initiative and Referendum Act*, [1919] A.C. 935, 48 D.L.R. 18, [1919] 3 W.W.R. 1. This view is supported by the history of s. 85, which was derived from The Constitutional Act, 1791, and The Act of Union, 1840, and by The Colonial Laws Validity Act, 1865.

The duration of the Assembly involves prerogative or Crown rights existing in Canada before Confederation, and cannot be amended under s. 92(1) because of s. 65. Ss. 80, 91, 92 and 129 illustrate necessary restrictions on the meaning and scope of the power of amendment under s. 92(1). This power can be no wider than that conferred by s. 5 of The Colonial Laws Validity Act, which the Dominion Parliament shares with all other legislatures. If the Province can amend or alter s. 85, then the Dominion can amend or alter s. 50, but the extension of the life of the House of Commons by an amendment to The British North America Act in 1916 is strong evidence that the Dominion claims no such authority. The power of the Province in this respect can be no greater than that of the Dominion: *Smiles v. Belford* (1877), 1 O.A.R. 436, 1 Cart. 576, 2 Can. Com. R. 216.

Colonial legislatures have never had jurisdiction to affect constitutional rights of the Crown within the colony. These were subject only to Imperial authority; the Governor's commission and instructions: *Musgrave v. Pulido* (1879), 5 App. Cas. 102; *Bonanza Creek Gold Mining Company Limited v. The King*, [1916] 1 A.C. 566 at 578-587, 25 Que. K.B. 170, 26 D.L.R. 273, 10 W.W.R. 391, 34 W.L.R. 177.

These constitutional rights of the Crown are entirely different from prerogative rights in subject-matters of conferred legislative authority, such as incorporation of companies with Provincial objects and other local matters. This interpretation

of The British North America Act also applies to s. 5 of The Colonial Laws Validity Act: *Taylor et al. v. The Attorney-General of Queensland et al.* (1917), 23 C.L.R. 457 at 473, 474. S. 5 of the latter Act applies to and limits the exercise of authority under s. 92(1), preserving the supremacy of Imperial statutes, and imposing respect for "form and manner" of amendment of the constitution, as well as for substance: *Attorney-General of New South Wales et al. v. Trethowan et al.*, [1932] A.C. 526, and in the court below, 44 C.L.R. 394 at 424-433.

The words "notwithstanding anything in this Act" confer no new jurisdiction not found elsewhere in the clause. They do not affect the application of s. 5 of The Colonial Laws Validity Act. Just as the word "Constitution" is restricted in meaning by its context, so these words cannot be given a wide or unlimited construction without upsetting the whole scheme as set out in ss. 91 and 92; they cannot override the express limitations of ss. 65, 80 and 129.

The words "except as regards the Office of Lieutenant-Governor" refer to the latter's functions, power and authority under s. 65, and include all powers and functions conferred on him by Imperial statute or Dominion law, of which the calling of a new Assembly is one, given before Confederation and continued thereafter. This is illustrated by the Royal Proclamation of 7th October 1763, and other proclamations by the governors. For a description of the royal prerogative in summoning Parliament, exercised in Ontario by the Lieutenant-Governor, see 24 Halsbury, 2nd ed., p. 176, para. 295; 6 Halsbury, 2nd ed., p. 462, paras. 551-554; also Broom and Hadley, Commentaries, vol. 1, pp. 177, 220-222. The summoning of a new Assembly is a constitutional right of the Crown in Ontario, conferred by statute, and to be exercised according to law. It is not the same as, or dependent upon, the right to dissolve the Assembly, which latter is discretionary, to be performed only on the advice of the Ministers. Withdrawal or abolition of the statutory right and duty of the Governor to call a new Assembly is not compensated by retaining the discretionary right to dissolve an existing Assembly, on advice.

The 1942 Act is neither in form and manner nor in substance an amendment of the constitution, and in this respect it is distinguishable from the Quebec statute of 1881. In terms it contradicts itself, in ss. 1 and 2. By virtue of s. 11 of The

Interpretation Act, R.S.O. 1937, c. 1, that conflict must be resolved in favour of s. 2.

The right to proceed by *quo warranto* in these circumstances is established by *Darley v. Reg.* (1845), 12 Cl. & F. 520, 8 E.R. 1513; *Rex v. Speyer*; *Rex v. Cassel*, [1916] 1 K.B. 595; *Askew v. Manning et al.* (1876), 38 U.C.Q.B. 345; *Rex ex rel. The Township of Stamford v. McKeown et al.*, [1934] O.R. 662, [1934] 4 D.L.R. 644. Each respondent has assumed to occupy a public office, that of Assemblyman, to which his lawful title has expired. The function of this office is to advise His Majesty, represented by the Lieutenant-Governor, in matters of legislation. It is performed by each Assemblyman as a member of a corporate body known as the Legislative Assembly, which has the character of a corporation created by statute. The office is a "public" one because: (a) it is created by His Majesty, on the advice of the Imperial Parliament (The British North America Act); (b) the holder of the office is elected by the people; (c) he takes oaths of office and of allegiance to the Crown; (d) he receives remuneration from the consolidated revenue fund; (e) his duties and privileges are defined by statute; and (f) his term of office is fixed by statute, and he does not hold office at will or at pleasure.

These proceedings are therefore appropriate to test the legal title to that office. They have been found appropriate in the case of such public officers as judges, administrative and judicial officers, municipal officials, elected representatives of governmental bodies, and His Majesty's Imperial Privy Councillors. The office of Assemblyman has not been withdrawn from the scope of the common law remedy, as was done by The British North America Act in the case of legislative councillors (*expressio unius est exclusio alterius*), and in the absence of statutory restriction that remedy is universal in its application: *Darley v. Reg.*, *supra*; *Rex v. Speyer*, *supra*. The statutes 4-5 W. & M., c. 18 and 9 Anne, c. 20, as well as ss. 141-143 of The Judicature Act, are procedural only—the right invoked is one at common law. The Lower Canada statute of 1849, 12 Vict., c. 12, may be looked at to show the scope of the remedy as viewed by Canadian legislative draftsmen.

Assemblymen, like all other persons, must obey the law, and the law finds means of compelling obedience, as in *Attorney-General v. Trethowan*, *supra*, where an injunction was used to

prevent the submission of a bill which had passed both houses of the legislature. The Ontario Legislative Assembly and its members have only such privileges and immunities as are given by statute or are necessarily incidental to the performance of their statutory duties: *Kielley v. Carson et al.* (1841-42), 4 Moo. P.C. 63 at 88, 92, 13 E.R. 225; *Doyle et al. v. Falconer* (1866), L.R. 1 P.C. 328, 4 Moo. P.C. (N.S.) 203, 16 E.R. 293. They have no inheritance of privileges or immunities from the previous Parliament of Canada, or from the Parliament of Great Britain. No specific privileges are conferred by The British North America Act, and all statutory privileges must be found in The Legislative Assembly Act, R.S.O. 1937, c. 12. These are not the same in scope or in origin as those of the House of Commons of Canada or of the Legislature of Nova Scotia, referred to in *Fielding et al. v. Thomas*, [1896] A.C. 600, C.R. [11] A.C. 278, 5 Cart. 398; and *Landers et al. v. Woodworth* (1878), 2 S.C.R. 158; see also Ontario statute, 1868, c. 3, disallowed by proclamation, 4th December 1869, and correspondence as to disallowance in Hodgins, Dominion and Provincial Legislation, pp. 48, 50, 54, 60, 62, 63.

No other legal remedy is available to test the legality of a *de facto* Assembly. It is not sufficient to wait until legislation of doubtful validity has been enacted, and then attack such legislation. The Court must interfere to restrain illegal usurpation of office: see recitals in 9 Anne, c. 251. *Quo warranto* is the ancient procedure for this very purpose: *Darley v. Reg.*, *supra*, at p. 544; *Rex ex rel. The Township of Stamford v. McKeown*, *supra*. Controverted elections are definitely a privilege of Parliament, which have been dealt with by statutes, and as to which jurisdiction has been expressly given to the courts. The existence of that Act and its subject-matter do not affect the present question in any way.

C. The respondents' notice of motion was irregular, in that it was merely the negative of our motion, notice of which was served two weeks earlier, and had the effect of withdrawing the question from the jurisdiction of the judge before whom our originating notice was returnable. There is no authority under Rule 124, which has never heretofore been applied to an originating notice, and the case is not one for invoking the inherent jurisdiction of the Court to quash, before presentation of the motion. Having shown by his reasons for judgment that

serious and important questions of law were involved, the judge of first instance should have left these questions for argument and determination after completion of the applicant's evidence and other material, and in the forum and by the judge before whom they were intended to be brought: *Electrical Development Company of Ontario v. Attorney-General for Ontario et al.*, [1919] A.C. 687 at 689, 693-695, 47 D.L.R. 10; *Dyson v. Attorney-General*, [1911] 1 K.B. 410. Such questions as are here raised, of their nature, cannot be frivolous or vexatious.

D. No immunity or privilege attaches to the office or functions of the Clerk of the Legislative Assembly or of the Chief Election Officer, to excuse him from attending in court to give evidence. Matters of privilege as to particular questions can arise only after he has attended and the questions have been put. Resolutions of the British House of Commons or of the House of Lords can have no effect or validity in Ontario, where *lex et consuetudo parliamenti* is not part of the law: *Kielley v. Carson et al.*, *supra*; *Doyle et al. v. Falconer*, *supra*. The subpoena served could not interfere with the performance of duties either to the Assembly or to the Crown. There was no material before the judge, or any evidence of fact or admissions of counsel, upon which any claim of privilege, absolute or qualified, could be founded. We did not at any time admit that the Legislature was in lawful session at the time of the issue, or the return date, of the subpoena.

C. R. Magone, K.C., for the respondents and for the Attorney-General: The Colonial Laws Validity Act, 1865, 28-29 Vict. (Imp.), c. 63, does not apply to legislation passed after The Statute of Westminster, 1931 (Imp.), c. 4, by force of ss. 2 and 7(2) of the latter statute. [RIDDELL J.A.: Is it your argument that Canada has been made an independent nation since 1931, and that the Province has practically the same power as regards legislation?] Yes. The Province lacks the extra-territorial powers possessed by the Dominion, but that is the only difference.

But for The Controverted Elections Act, R.S.O. 1937, c. 11, the Court could not inquire into the right of an individual to be elected; its power is limited, and it may not inquire into the right of any person to sit in Parliament, this being exclusively a privilege of Parliament, *i.e.*, of the Legislature: May, Parliamentary Practice, 15th ed., p. 64. Unless such a power is ex-

pressly given to the Court by statute (and it is not), it does not possess it: *Rex v. Graham-Campbell*; *Ex parte Herbert*, [1935] 1 K.B. 594 at 602. [HENDERSON J.A.: The appellant contends that the Ontario Legislature, being a statutory body, has only such privileges as are given to it by statute, and thus differs from the House of Commons.] *Temple v. Bulmer*, [1943] S.C.R. 265, was an application for an order in the nature of a *mandamus*, to compel the holding of a by-election, and it was decided that this matter was solely within the jurisdiction of the Legislature. [RIDDELL J.A.: From what statute does the Legislature derive its powers?] The Constitutional Act, 1791, 31 Geo. III., c. 31; The Act of Union, 1840, 3-4 Vict., c. 35; The Colonial Laws Validity Act, *supra*, and The British North America Act, 1867. The appellant contends that the legislatures of Nova Scotia and New Brunswick have inherited certain privileges, but that those of Ontario and Quebec have not, because their existing legislatures were not continued by special provision. Obviously, the legislature of the Province of Canada could not be continued when it was divided into two Provinces. [RIDDELL J.A.: Why could it not have been said that each of the legislatures would have the same power as the one legislature formerly had? The question is, has it been done?] Further authorities in support of the proposition that this is a matter exclusively within the jurisdiction of the Legislature itself are *Re North Perth*; *Hessin v. Lloyd* (1891), 21 O.R. 538 at 545; *In re Centre Wellington Election* (1879), 44 U.C.Q.B. 132 at 139.

The proceedings are improperly taken as a means of testing the validity of a statute. The appellant could have raised the question in an ordinary action, or by suing the Attorney-General for a declaratory judgment. [HENDERSON J.A.: How can Rule 124 be invoked to quash proceedings instituted by originating notice? There is no pleading.] Rule 124 merely embodies the inherent right of the Court to prevent abuse of its process: *Orpen v. Attorney-General for Ontario*, 56 O.L.R. 327, [1925] 2 D.L.R. 366; *Keewatin Power Co. Ltd. v. Keewatin Flour Mills Co. Ltd.*, 59 O.L.R. 406, [1926] 4 D.L.R. 531.

Quo warranto does not lie in the circumstances of this case. The respondents do not hold an "office" within the meaning of *Darley v. Reg.* (1845), 12 Cl. & F. 520, 8 E.R. 1513, which case must be taken as the starting-point in considering the present law as to *quo warranto*. If these proceedings are properly

brought here, they might equally be brought in England, since what is invoked is an alleged common law right to have the Court inquire into the right of an individual to sit in Parliament. [RIDDELL J.A.: One parliament has created another parliament; the first parliament has certain powers, and by implication the created one has the same powers, unless they are expressly reserved.] The extension of the Legislative Assembly's term by 1930, c. 4, s. 2, was never questioned, nor was a similar earlier statute, 1918, c. 4, s. 2.

As to the validity of the statute, I refer also to *Fielding et al. v. Thomas*, [1896] A.C. 600 at 610, C.R. [11] A.C. 278, 5 Cart. 398; *Reference re "Supreme Court Act Amendment Act"*, [1940] S.C.R. 49 at 117, [1940] 1 D.L.R. 289 (*sub nom. Reference re Privy Council Appeals*).

V. Evan Gray, K.C., in reply.

Cur. adv. vult.

11th June 1943. RIDDELL J.A.:—This is an appeal from the judgment of Mr. Justice Hope, delivered 17th April, allowing a motion by the respondents.

I refrain from going into the facts, as it was on the argument of the appeal admitted on all hands that the real—substantially the sole—matter to be decided was the power of the Legislature of Ontario to extend its term of office by a statute.

The Legislature of Ontario, by a statute, extended its fixed term of office. This, the appellant here attacks as beyond its powers.

The case was argued at great length—not too great, be it said; and now the question is before us for decision.

Our task is materially lightened by the candid acceptance by all concerned of the principle laid down in such cases as *Florence Mining Co., Limited v. Cobalt Lake Mining Co., Limited* (1908), 18 O.L.R. 275, affirmed in the Court of Appeal (1909), 18 O.L.R. at 282, and the Judicial Committee of the Privy Council (1910), 43 O.L.R. 474, 102 L.T. 375, C.R. [1911] 2 A.C. 412, that “the Legislature within its jurisdiction can do everything that is not naturally impossible and is restrained by no rule human or divine.” In other words, the Court is to look to the ambit of the jurisdiction conferred on the Legislature, and has no right to consider the justice, the wisdom, the result of the legislation.

By the British North America Act, from which legislation of the mother country the Legislature receives its powers,—it is provided, by s. 85, that “Every Legislative Assembly of Ontario . . . shall continue for Four Years from the Day of the Return of the Writs . . .” This provision, I conceive, is a part of the “constitution” of the Province.

The British North America Act, however, by s. 92, expressly gives power to the Legislature to amend “from Time to Time”, notwithstanding anything in this Act “the Constitution of the Province, except as regards the Office of Lieutenant-Governor.”

As was pointed out in the Blumenthal Lectures in Columbia University twenty years ago (The Canadian Constitution in Form and in Fact, 1923, p. 4), advantage has been taken of this power, and “the term of a Legislature has been extended by the Legislature itself”.

That the length of time an elected legislature may remain without a new election is a part of the constitution cannot be successfully contested—and I am wholly unable to see how the extension of its term by a legislature can in any sense be considered anything that affects the rights, power, functions, etc. of the Lieutenant-Governor.

It was suggested that if the Lieutenant-Governor wished a new House, the Secretary of State might refuse to bring him the Great Seal—but surely, if anything of that kind took place, the Lieutenant-Governor could at once dismiss the recalcitrant and appoint a new Secretary, who would do as he was told.

The propriety of *quo warranto* proceedings being resorted to in such a case was raised and carefully argued. I find that my learned brother Laidlaw has fully considered the question. Having read his judgment, I think that there is no necessity for me to discuss the question, and content myself with saying that I agree with his reasoning and conclusion.

The appeal should be dismissed, with costs throughout.

FISHER J.A.:—Since all my brethren in this appeal agree—as I do—that Hope J. was right in striking out the notice of motion in the nature of *quo warranto*, on the grounds that it was frivolous and vexatious and that it disclosed no reasonable cause of action, I do not deem it necessary to discuss the question of the power of the Legislature of Ontario to extend its term of office by statute.

I would dismiss the appeal with costs.

HENDERSON J.A.:—An appeal from an order of Hope J., dated 17th April 1943, quashing the proceedings and setting aside the subpoena in question as frivolous and vexatious. The proceedings are by way of *quo warranto*, initiated by originating notice dated the 15th day of March 1943, and the order appealed from was made on motion of the respondents under Rule 124.

The respondents are all members of the Ontario Legislature, James H. Clark being the Speaker of the Legislature, Gordon D. Conant the Attorney-General, and George A. Drew the Leader of the Opposition.

Chapter 24 of the Statutes of Ontario, 6 Geo. VI, being An Act to extend the Duration of the present Legislative Assembly, was passed by the present Legislative Assembly in the session of 1942, and was assented to by the Lieutenant-Governor on behalf of the Crown on 15th April 1942. Its provisions are as follows:

“HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

“1. Notwithstanding anything in *The Legislative Assembly Act* or in any other Act contained, the present Assembly shall continue until the 19th day of October, 1943, and it shall not be necessary to hold any general election to choose members of the Assembly until such date.

“2. Nothing in this Act shall affect or amend the provisions of section 4 of *The Legislative Assembly Act*, nor be taken or deemed to affect or abridge any prerogative of the Crown or the power of the Lieutenant-Governor to dissolve the Assembly at an earlier date than that mentioned in section 1.

“3. This Act may be cited as *The Legislative Assembly Extension Act, 1942*”.

The originating notice is for an order that the respondents “do show cause why you do, and each of you doth, unlawfully exercise or usurp the office, functions and liberties of a member of the Legislative Assembly of Ontario during and since the month of February, 1943, contrary to the provisions of the British North America Act (sec. 85 of Vic. cap. 3) whether or not the same are lawfully amended by the provisions of The Legislative Assembly Act (R.S.O. 1937, cap. 12, sec. 3), notwithstanding the provisions of an ‘Act to extend the Duration

of the present Legislative Assembly Act' (6 Geo. VI, cap. 24), which last-mentioned Act is *ultra vires* of the Legislature and void".

In the reasons for his order, Mr. Justice Hope has analyzed and discussed the legislation and the authorities, and I agree with the result of his order, and I think very little need be added.

S. 92 of The British North America Act, 1867, reads in part as follows:

"In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,—

"(1) The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant-Governor".

It was strenuously argued before us that the statute now sought to be declared *ultra vires* is in conflict with this provision because it affects the office of Lieutenant-Governor.

It is well settled by authority that the Legislature, when legislating upon a subject matter within its jurisdiction, has plenary powers with which the courts have no jurisdiction to interfere. In numerous cases the courts have exercised jurisdiction to examine the legislation in question before the court to ascertain whether it falls within a matter coming within the classes of subjects assigned to it by s. 92 of The British North America Act, and whether it is in pith and substance and in good faith legislation upon that subject matter, but beyond this no court has gone.

The statute now attacked in my opinion deals with an amendment to the constitution of the Province, and does not affect or prejudice the office of Lieutenant-Governor.

The functions and authority of the Lieutenant-Governor have been the subject of much discussion recently, and in my view it is unnecessary to discuss them here, except to say that the right of the Lieutenant-Governor to call for the advice of his responsible ministers and to act or not to act upon it, as seems best to him, and to dissolve the Assembly if he sees fit to do so, is in no way interfered with by the Act now attacked.

Further, in my opinion, the respondents are not unlawfully exercising or usurping the offices, functions and liberties of a member of the Legislative Assembly of Ontario. As members

of that Legislative Assembly they are not holding an office or franchise.

The case strongly relied upon for the applicants is *Rex v. Speyer; Rex v. Cassel*, [1916] 1 K.B. 595. This was an information in the nature of *quo warranto* against two members of the Privy Council whose appointment was alleged to be invalid because they were born abroad of foreign parents, and later became naturalized British subjects, and were therefore not capable of holding the office of Privy Councillor. It was held that an information in the nature of a *quo warranto* would lie at the instance of a private relator against a member of the Privy Council whose appointment was alleged to be invalid, and it was further held that the respondents in that case were capable of being members of the Privy Council.

It was further held that a Privy Councillor holds an office. So far as the authorities cited to us go, and they were very exhaustive, no case has ever occurred in which it has been held that a member of Parliament or of a Legislative Assembly in the British Empire holds an office or franchise, and in my opinion he does not, and I am therefore of opinion that these proceedings do not lie against the respondents.

The validity of the Act in question is, in my view, only indirectly attacked. These proceedings do not necessarily result in declaring either its validity or its invalidity, except for the purpose of disposing of these proceedings. It may be that in other proceedings of a proper kind, the validity or invalidity of the Act may be properly before the Court.

As these proceedings were fully argued both as to their merits and as to the propriety of the method in which the motion was dealt with, it is unnecessary to discuss Mr. Evan Gray's objections on that ground, but I do not wish to be taken as expressing any opinion as to whether a proceeding begun by originating notice can be properly dealt with on a motion to quash under Rule 124. I entertain considerable doubt upon this question.

In the result I think the appeal fails and must be dismissed with costs.

GILLANDERS J.A.:—For the reasons fully and clearly set out by my brother Laidlaw I agree that proceedings in the

nature of *quo warranto* cannot be successfully utilized here. I express no opinion as to the validity of the legislation sought to be questioned. Should the validity of this or similar legislation be raised in the future by appropriate proceedings, it may then be considered.

The appeal should be dismissed with costs.

LAIDLAW J.A.:—This is an appeal from an order of Hope J., dated 17th April 1943, whereby certain proceedings commenced by the appellant by notice of motion were struck out. The notice is of a motion, in the nature of *quo warranto*, for an order that James H. Clark, Gordon D. Conant, and George A. Drew show cause why they “unlawfully exercise or usurp the office, functions and liberties of a member of the Legislative Assembly of Ontario during and since the month of February, 1943. . . .”

An application was then made to the Court on behalf of James H. Clark and Gordon D. Conant for an order under Rule 124, striking out the notice of motion in the nature of *quo warranto*, on the grounds that it was frivolous and vexatious, and that it disclosed no reasonable cause of action.

While it appears that the appellant seeks an order of the Court to oust the respondents from the seats occupied by them in the Legislative Assembly of Ontario, the real object of the proceedings is to attack the validity of an Act of the Legislature entitled An Act to extend the Duration of the present Legislative Assembly, being chapter 24 of the Statutes of Ontario, 1942. But it is to be observed at once that the learned judge did not determine this question. On the contrary, he expressly refrained from doing so. He decided only that the proceedings taken by the appellant did not lie against a member of the Legislative Assembly, and, in the exercise of the Court's discretion, made an order that they be struck out. That order alone is the subject of appeal.

There can be no doubt that the Court has ample jurisdiction to make the order in appeal. The jurisdiction is inherent, and is found in Rule 124, as follows:—

“124. A judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown to be frivolous or vexatious, may order the action

to be stayed or dismissed, or judgment to be entered accordingly". See *Chatterton v. Secretary of State for India in Council*, [1895] 2 Q.B. 189; *In re Norton's Settlement*; *Norton v. Norton*, [1908] 1 Ch. 471 at 478; *Orpen v. Attorney-General for Ontario*, 56 O.L.R. 327 at 332, [1925] 2 D.L.R. 366; *Keewatin Power Co. Ltd. v. Keewatin Flour Mills Co. Ltd.*, 59 O.L.R. 406, [1926] 2 D.L.R. 619, [1926] 4 D.L.R. 531.

The power to strike out proceedings should be exercised with great care and reluctance. Proceedings should not be arrested and a claim for relief determined without trial, except in cases where the Court is well satisfied that a continuation of them would be an abuse of procedure: *Evans v. Barclay's Bank et al.*, [1924] W.N. 97. But if it be made clear to the Court that an action is frivolous or vexatious, or that no reasonable cause of action is disclosed, it would be improper to permit the proceedings to be maintained. The action may be stayed if an action is brought to obtain relief which the Court has no power to grant; *Dreyfus v. Peruvian Guano Company* (1889), 41 Ch. D. 151; *Wing et al. v. Burn et al.* (1928), 44 T.L.R. 258; *In re Visser*; *The Queen of Holland v. Drukker et al.*, [1928] 1 Ch. 877. It should also be apparent that the proceedings should be struck out if the applicant to the Court has no status to pursue the remedy, or no proper authority so to do. This result should follow, irrespective of the form of the proceedings. I cannot make any distinction between an action commenced by writ of summons and a proceeding commenced by originating notice. Under The Judicature Act, R.S.O. 1937, c. 100, s. 1(a), "'Action' shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by the rules". The same principles are applicable and should govern the exercise of the Court's discretion in either case.

Proceedings in the nature of *quo warranto* must be instituted and taken by notice of motion, as provided in s. 141 of The Judicature Act, which reads as follows:

"141. (1) Except in the cases mentioned in sections 144 and 145 all proceedings against any person who unlawfully claims or usurps, or is alleged unlawfully to claim or to usurp any office, franchise or liberty, or who has forfeited or is alleged to have forfeited any franchise, by reason of non-user or misuser thereof, which have heretofore been instituted or taken by writ of *quo warranto*, or by information in the nature of a writ

of *quo warranto*, hereafter shall be instituted and taken, where the proceeding is by the Attorney-General *ex officio*, by notice of motion calling on the person against whom the proceeding is taken to show cause why he unlawfully exercises or usurps such office, franchise or liberty.

“(2) Where the proceeding is at the instance of a relator it shall be taken in the name of His Majesty on the relation of such person, and such person shall before serving the notice of motion give security for the due and effectual prosecution thereof in like manner as nearly as may be and in the like amount as is, according to the practice of the Supreme Court, required to be given on an application to quash a conviction or order made by a justice of the peace, or in such manner and amount as the court may direct.”

This section is procedural only. It substitutes proceedings by notice of motion in place of proceedings theretofore instituted or taken by writ of *quo warranto* or by information in the nature of a writ of *quo warranto*. It gives no new right whatsoever to any person, and does not enable anyone to pursue a remedy which he did not possess before the change in procedure. It is essential therefore to examine the right which the appellant would have had to institute or take proceedings by writ of *quo warranto* or by information in the nature of a writ of *quo warranto*. This necessitates a study of the nature and scope of such proceedings, not merely as a topic of antiquarian research, but to ascertain whether they afforded a remedy for the present complaint.

A concise history of the proceedings appears in the judgment of Lord Reading C.J. in *Rex v. Speyer*; *Rex v. Cassel*, [1916] 1 K.B. 595 at 608; also in the judgment of Riddell J. in *Rex ex rel. Morton v. Roberts*; *Rex ex rel. Morton v. Rymal* (1912), 26 O.L.R. 263 at 271, 4 D.L.R. 278. The ancient writ of *quo warranto* had its origin at common law. “Since the conquest, wherever land was held, or a franchise exercised by a subject, the King might call upon him to show what were the conditions of his tenure, or by what authority the franchise was enjoyed; or, where the title to land or to a franchise was clear, he might require to be satisfied that the grantee had complied with the conditions upon which the grant had been made”. Tancred, *Quo Warranto*, introduction, p. i. “The writ of *quo warranto* is in the nature of a writ of right for the King,

against him who claims or usurps any office, franchise or liberty to inquire by what authority he supports his claim, in order to determine the right." Blackstone, Commentaries, Book iii, c. 17, s. 5, quoted in Shortt, Informations, Mandamus and Prohibition, p. 108. The essence of the procedure was that the Sovereign was calling on a subject to account for an invasion or usurpation of the Royal prerogative, or of the rights, franchises or liberties of the Crown. The *quo warranto* at common law was an original writ out of Chancery. Tancred, *op. cit.*, p. v. The first Statute of Quo Warranto (Statute of Gloucester, 1278, 6 Ed. I) made the writ returnable in King's Bench or before the justices in eyre. In order to remedy delays and excessive expense, two statutes were passed in 1290 (18 Ed. I, stats. 2 and 3). Under these statutes the pleas were determined in the circuit of the justices. But the complicated nature of the process and the circumstance that the judgment on the writ was final and conclusive contributed to the disuse of the writ. In its place was substituted the information in the nature of a writ of *quo warranto*. Sir Matthew Hale thinks this was about 10 Edw. III (History of Common Law (1716 Ed.) 168), but Coke considers it to have been considerably later: see 2 Inst. 498. But "The Court . . . will not extend this remedy beyond the limits prescribed to the old writ; and as that could only be prosecuted for an usurpation on the rights or prerogatives of the Crown, so an information in the nature of *quo warranto*, can only be granted in such cases": Chitty, Prerogatives of the Crown, p. 337.

For a long time the only informations were those filed *ex officio* by the Attorney-General or Solicitor-General on behalf of the Crown. Later, informations were exhibited and filed at the instance of private individuals. This practice was abused, and became oppressive and vexatious. To remedy this condition the statute of 1692, 4 and 5 W. & M., c. 18, was passed. It restrained the coroner and attorney from exhibiting, receiving or filing an information for trespasses, batteries, or other misdemeanours, "without express Order to be given" by the Court, and without taking a recognizance from the person procuring the information before issue of any process. That Act became law in this Province, and resort must be had to it: The Property and Civil Rights Act, R.S.O. 1937, c. 145. The purpose and effect of the Act is to require a private individual

first to obtain leave of the Court and to furnish a recognizance before proceeding by way of an information in the nature of *quo warranto*. The statute is restrictive. It does not enlarge the right of an individual, or enable him to institute proceedings in any case to which the procedure was not properly applicable before the statute was passed. Moreover, while, by s. 141(2) of The Judicature Act, a relator "shall before serving the notice of motion give security", the requisite leave of the Court to carry on proceedings of the kind in question has not been dispensed with, and is still necessary under the present practice.

The statute 9 Anne, c. 20, was passed in 1710 to enlarge the rights of the subject. It is "An Act for rendring the Proceedings upon Writs of *Mandamus*, and Informations in the Nature of a *Quo Warranto*, more speedy and effectual; and for the more easy Trying and Determining the Rights of Offices and Franchises in Corporations and Boroughs". The offices described in the Act are "Mayors, Bailiffs, Portreeves and other Offices, within Cities, Towns Corporate, Boroughs and Places, within that Part of Great Britain called England and Wales". But it is expressly provided that "it shall and may be lawful to and for the proper Officer . . . with the Leave of the . . . Court . . . to exhibit one or more Information or Informations in the Nature of a *Quo Warranto*, at the Relation of any Person or Persons desiring to sue or prosecute the same". This Act is part of the law of this Province, but the procedure is by notice of motion: Statutes of Ontario 1902, c. 1, ss. 11-16 and schedule to Act. This Act applies only to corporate offices in corporate places: per Bayley J. in *Rex v. M'Kay* (1826), 5 B. & C. 640 at 646, 108 E.R. 238; see also per Blackburn J. in *Rex v. Backhouse* (1866), 7 B. & S. 911 at p. 921. The franchises mentioned in the Act mean only corporation rights or rights to freedom in corporations: per Denison J. in *Rex v. Williams* (1757), 1 Burr. 402 at 408, 97 E.R. 371.

It is said too that "the Act of the 9th of Anne extends only to the cases of individuals usurping offices or franchises in corporations, when the right of the body to act as a corporation is acknowledged: an information against the whole corporation, as a body, to shew by what authority they claim to be a corporation, can be brought only by, and in the name of the Attorney-General". Tancred, *op. cit.*, p. 15. It has also been argued (per

Sir F. E. Smith, *arguendo*, in *Rex v. Speyer*, *supra*, at p. 599) that there is a distinction between cases which affect individuals or groups of individuals, and cases which affect the nation as a whole, and that in the latter case the Attorney-General alone has the right to move. Be that as it may, it is quite certain that the circumstances in which the present proceedings were commenced do not bring the case within the statute of Anne. The individual must find his right to proceed as it existed apart from and before the passing of this Act, unless at a subsequent time his right in law has been enlarged by enabling statute. There is no such statute. The result is that an information in the nature of *quo warranto* could not, in such a case, be exhibited or filed at the instance of a private individual, without leave of the Court, and likewise the present proceedings by notice of motion in lieu of the former procedure cannot be carried on without such leave.

If such leave should properly be granted, the Court might stay the proceedings pending an application for it, but if the leave should not be given, the proceedings cannot be maintained, and should, accordingly, be struck out. I therefore examine the law to ascertain whether it would be right and proper to give leave in the particular circumstances of this case. The question is one for the exercise of the Court's discretion. "It would be very grievous", said Lord Mansfield, in *Rex v. Wardroper* (1766), 4 Burr. 1964, 98 E.R. 23, "that the information should go of course: and it would be a breach of trust in the Court, to grant it as of course. On the contrary, the Court are to exercise a sound discretion upon the particular circumstances of every case". See also *Rex v. Dawes* (1767), 4 Burr. 2023, 98 E.R. 54, and per Lord Kenyon C.J. in *Rex v. Sargent* (1793), 5 Term Rep. 466, 101 E.R. 262; *Rex v. Parry* (1837), 6 Ad. & El. 810, 112 E.R. 311. No precise rule can be laid down: per Lord Mansfield in *Rex v. Stacey* (1785), 1 Term Rep. 1 at 3, 99 E.R. 938. "There are many cases in which, though the nature of the office is such as to make the procedure by *quo warranto* the appropriate method of testing the validity of the title to it, yet the Court in the exercise of its discretion will refuse its assistance". Shortt, *Informations, Mandamus and Prohibition*, p. 147: "The consequences which may result from granting the information will also influence the exercise of the Court's discretion": *Ibid.*, p. 149. The fact that an objection to

an individual member applies to every other member of a corporation, and may have the effect of dissolving the corporation, may be considered: per Abbott C.J., in *Rex v. Trevenen* (1819), 2 B. & Ald. 482, 106 E.R. 441; see also High's Extraordinary Legal Remedies, 3rd ed., p. 558, quoted by Hope J., as follows:

"And the principle is now firmly established, that the granting or withholding leave to file an information, at the instance of a private relator, to test the right to an office or franchise, rests in the sound discretion of the court to which the application is made, even though there is a substantial defect in the title by which the office or franchise is held. In the exercise of this discretion, upon the application of a private relator, it is proper for the court to take into consideration the necessity and policy of allowing the proceeding, as well as the position and motives of the relator in proposing it, since this extraordinary remedy will not be allowed merely to gratify a relator who has no interest in the subject of inquiry. The court will also weigh the considerations of public convenience involved, and will compare them with the injury complained of, in determining whether to grant or refuse the application . . . The expediency of permitting it to be filed is also a proper matter for the consideration of the court, and the fact that a successful prosecution of the proceedings, which are brought to test the title to a municipal office, may result in the suspension of all municipal government in a city for a long period of time, may properly be taken into account in deciding upon the application".

I have carefully considered all these matters, and concluded that the Court, in the exercise of its discretion, should not give leave to institute or carry on these proceedings, and therefore, in the absence of such authority, they cannot be maintained. On this ground alone the appeal should be dismissed. In view, however, of the argument of counsel on other grounds, I shall express my opinion in respect of them.

It was argued that a member of the Legislative Assembly occupies an "office" within the meaning and intent of s. 141 of The Judicature Act. The word "office" is used in the statute of Anne, but I do not find it in the Statute of Gloucester, 6 Ed. I, nor in the statute *de quo warranto novum*, 18 Ed. I. Those Acts refer to "liberties" and "franchises". There is no

substantial difference in the meaning of the words "franchise" and "liberty". The definition as quoted by Hope J. from Blackstone's Commentaries, Book II at p. 37, is "a royal privilege, or a branch of the king's prerogative, subsisting in a subject" by a grant from the King. Blackstone defines an "office" as "a right to exercise a public or private employment, and to take the office and emoluments thereunto belonging . . . whether public, as those of a magistrate, or private, as bailiffs, receivers and the like" (quoted also by Hope J.). I think that the word "office" as used in The Judicature Act does not enlarge the class of cases in which the proceeding by writ of *quo warranto*, or by information in the nature of *quo warranto* could be instituted. It has been urged that the right to proceed was established by the authority of *Darley v. Reg.* (1845), 12 Cl. and F. 520, 8 E.R. 1513. I do not agree. Before that case there had been a conflict of judicial opinion on the question whether an information in the nature of a *quo warranto* would lie for the usurpation of an office created, not by charter, but by Act of Parliament. The House of Lords in that case adopted the opinion of the judges, delivered through Tindal C.J., viz., that there was no difference between an office created by charter and one created by Act of Parliament; in both cases the assent of the sovereign was necessary; and whether this was given by charter or by assent to an Act of Parliament passed by both branches of the legislature was altogether immaterial; see Shortt, *op. cit.*, p. 121, and *Darley v. Reg.*, *supra*, per Lord Lyndhurst L.C. at p. 543. Shortt says, at p. 121: "The rule, as previously understood, was that *quo warranto* was not the remedy unless there was an usurpation actually upon the Crown. This has now been altered, and a rule of much less definite character, and one more difficult of application, has been substituted. See *per Coleridge J. in Rex v. The Guardians of the Poor of St. Martin's in the Field* (1851), 17 Q.B. 149 at 162, 117 E.R. 1238". Nor does the case of *Rex v. Speyer*, *supra*, demonstrate that a member of the Legislative Assembly occupies such a position as to fall within the class of cases to which the procedure in question is applicable. A member of the Legislative Assembly holds a "seat", and may be appointed to some office in the body. He is a representative of the people, and a delegate elected by the majority of voters. But his po-

sition is not such as arises by virtue of charter or Act of Parliament, within the meaning and intention of the law.

It was contended that there was no jurisdiction in any court to inquire into the right of a person to sit in the Legislative Assembly; that a limited right only was given to a court in matters of controverted elections: see *The Controverted Elections Act*, R.S.O. 1937, c. 11, s. 87. It was also urged that the right of a person to sit in Parliament was a matter exclusively within the jurisdiction of Parliament, and was a privilege of Parliament. The power of determining matters touching the election of its members is peculiar to "the Commons". "This right had been regularly claimed and exercised since the reign of Queen Elizabeth, and probably in earlier times, although such matters had been ordinarily determined in chancery": *May's Parliamentary Practice*, 13th ed., p. 64. This power exists, in my opinion, in the Legislative Assembly of this Province, although it is not expressly conferred by statute. It is inherent, and it must be presumed that it was the intention that such jurisdiction should be given at the time when the constitution of the Legislature was created by the Imperial Parliament. It could not be supposed that the parliament of this Province should possess fewer privileges and rights of this kind than are enjoyed by the mother parliament, through whom it came into being. In *Re North Perth; Hessin v. Lloyd* (1891), 21 O.R. 538, Meredith J. at p. 545, says: "... where jurisdiction is not expressly conferred, it was not intended that this Court should exercise any of the rights or powers of the high Court of Parliament in any proceedings under the Acts respecting the representation of the people in Parliament". See also *Rex v. Graham-Campbell; ex parte Herbert*, [1935] 1 K.B. 594 at 602; also *Temple v. Bulmer*, [1943] S.C.R. 265.

The Legislature has surrendered part of its jurisdiction by Acts relating to controverted elections. But those Acts must be construed strictly and literally. They do not take away from the Legislative Assembly all power to deal with matters pertaining to election of its members. In *Valin v. Langlois* (1879), 3 S.C.R. 1, Ritchie C.J. at p. 10, says: "As the House of Commons in England exercised sole jurisdiction over all matters connected with controverted elections, except so far as they may have restrained themselves by statutory restrictions, the several Houses of Assembly always claimed and exercised in

like manner the exclusive right to deal with, and be sole judges of, election matters, unless restrained in like manner, and this claim, or the exercise of it, I have never heard disputed". Speaking of the Quebec Controverted Elections Act, the Lord Chancellor (Lord Cairns) in the case of *Théberge et al. v. Laudry* (1876), 2 App. Cas. 102 at 106, C.R. [8] A.C. 1, 2 Cart. 1, says, "They are not Acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating an entirely new, and up to that time unknown, jurisdiction in a particular Court of the colony for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that Court, that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly". And at p. 107 he continues: "Now, the subject matter, as has been said, of the legislation is extremely peculiar. It concerns the rights and privileges of the electors and of the Legislative Assembly to which they elect members. Those rights and privileges have always in every colony, following the example of the mother country, been jealously maintained and guarded by the Legislative Assembly. Above all, they have been looked upon as rights and privileges which pertain to the Legislative Assembly, in complete independence of the Crown, so far as they properly exist". It must not be overlooked too that the real object of these proceedings is to attack the validity of the statute to extend the duration of the Legislative Assembly. The aim is to compel an election in the Province as if the prerogative right to dissolve the Assembly had been exercised by the Lieutenant-Governor. Under the guise of these proceedings the Court is invited to bring about the same result as would follow from such dissolution, and this in the absence of assent by the Lieutenant-Governor. This would clearly be an interference and encroachment by the Court on the prerogative right of the Crown, enjoyed and exercisable by the Lieutenant-Governor. Such a condition of affairs could not be permitted, and any attempt to bring it about must be promptly arrested.

It becomes unnecessary to say anything as to the service of a subpoena on Alex. C. Lewis, except that it was properly set aside by Hope J.

For all the reasons I have given, I am of the opinion that the order of Hope J. should be affirmed, and that the appeal should be dismissed with costs.

Appeal dismissed with costs.

The relator applied, under s. 41 of The Supreme Court Act, R.S.C. 1927, c. 35, for special leave to appeal to the Supreme Court of Canada.

23rd June 1943. The motion was heard by ROBERTSON C.J.O. and KELLOCK and LAIDLAW JJ.A.

V. Evan Gray, K.C., for the relator, applicant.

C. R. Magone, K.C., for the respondents and the Attorney-General, *contra*.

At the conclusion of the argument, THE COURT delivered judgment orally, dismissing the motion with costs. The following written reasons were subsequently (on 5th July 1943) delivered for the Court by

ROBERTSON C.J.O. [after setting out the nature of the proceedings]:—The applicant urges a number of grounds upon which he contends that leave to appeal to the Supreme Court of Canada should be granted. After hearing full argument on both sides, we are of opinion, substantially upon the ground that the order desired to be appealed from was a discretionary order, that we should not grant leave to appeal, as asked.

It may be stated at the outset that while the motion before Hope J. did not require him to exercise the discretion which the judge hearing the applicant's motion for *quo warranto* might have exercised in determining whether or not the case was one in which the order asked for by the applicant should be made, yet, on the appeal from the order of Hope J., the whole merits of the applicant's original motion were gone into and argued at length.

The applicant, in opening his argument on the present motion, made it abundantly plain that the real purpose of his proceeding was to obtain the opinion of the Court that the Act of the Legislature of the Province of Ontario, being c. 24 of the statutes of 1942, whereby the life of the present Legislative Assembly was continued until the 19th day of October 1943, is invalid. It seems to us that it was quite within the province

of the Court of Appeal to consider, and to exercise a discretion, as to whether the applicant should be permitted to continue this proceeding for the avowed purpose. The applicant is not a resident of, nor a voter in, the electoral district that any of the respondents was elected to represent, and he has only the same interest in the Act in question as any other resident of the Province who is a voter at a Provincial election. Whether that affords a sufficient status for the *quo warranto* proceeding we need not discuss, but, obviously, there are persons who have a much greater and an entirely different interest in maintaining or in attacking the validity of the statute, for there were numerous Acts passed by the Legislature in the session of 1943 that directly affect the rights and interests of many individuals and corporations. On other grounds, discussed in the judgments, the propriety of the proceeding is attacked. Whether the applicant should, in all the circumstances, be allowed to use a *quo warranto* proceeding for obtaining a declaration or decision as to the validity of that statute, was a matter upon which, in our opinion, the Court of Appeal had a right to exercise its discretion, after hearing argument upon the whole case. In our opinion, it is not desirable that the applicant should be given special leave to carry this proceeding further, and to further litigate the questions that it raises. We are also of the opinion that s. 38 of The Supreme Court Act applies.

Upon these grounds we, therefore, refuse to grant special leave to appeal to the Supreme Court of Canada, and the applicant's motion is dismissed with costs.

Leave to appeal refused.

Solicitor for the relator, appellant: W. A. Toogood, Toronto.

Solicitor for the respondents: C. R. Magone, Toronto.

[COURT OF APPEAL]

**The Tolton Manufacturing Co. Limited et al. v. The Advisory
Committee for The Men's and Boys' Clothing Industry
for the Province of Ontario.**

Trades and Trade Unions — Regulation of Wages and Hours — Adoption of Schedule—Validity of Proceedings—Limits of Court's Power to Inquire—Burden of Proof—The Industrial Standards Act, R.S.O. 1937, c. 191, ss. 6-9.

Constitutional Law — Subject-matters of Legislation — Regulation of Wages and Hours of Labour—The Industrial Standards Act, R.S.O. 1937, c. 191—The British North America Act, ss. 91, 92—The Combines Investigation Act, R.S.C. 1927, c. 26, as amended.

In an action for a declaration that a schedule of wages and hours and days of labour, approved by the Minister of Labour as one agreed to by a proper and sufficient representation of employers and employees within the industry, under The Industrial Standards Act, R.S.O. 1937, c. 191, and, on the Minister's recommendation, declared in force by the Lieutenant-Governor in Council, was invalid, and for other relief consequent thereupon:

Held, (1) the Act was not, nor were the regulations made thereunder, *ultra vires* of the Provincial Legislature, either (a) as encroaching upon ground already occupied by The Combines Investigation Act, R.S.C. 1927, c. 26, or (b) as providing for indirect taxation;

(2) the Court cannot interfere with the discretion of the Minister to approve and recommend, or of the Lieutenant-Governor in Council to declare in force, a schedule that has been submitted by a conference held pursuant to the statute. But it is essential to action by the Minister and the Lieutenant-Governor in Council that there should in fact have been a schedule submitted by a conference within the meaning of the Act, and it is only in respect of such a schedule that their powers are given. The Court may inquire into the existence of this essential, and may declare an order-in-council invalid if it is not established;

(3) where the plaintiff seeks a declaration that an order-in-council is invalid because no conference has been properly called or held, and no schedule has been submitted by a conference such as the Act contemplates, the burden is on him to prove the facts upon which the claim of invalidity is based.

AN appeal from the judgment of Mackay J., [1942] O.R. 518, [1942] 3 D.L.R. 705, 78 C.C.C. 191. The nature of the issues, and the relief sought, are fully stated in the report of the trial judgment, and in the judgments now reported. The trial before Mackay J. was the second trial of the action. The judgment on the first trial is reported in [1940] O.R. 301, [1940] 3 D.L.R. 383, 74 C.C.C. 252, and that of the Court of Appeal, ordering a new trial, in [1941] O.R. 79, [1941] 2 D.L.R. 541.

19th to 22nd April and 27th April 1943. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and KELLOCK JJ.A.

A. G. Slaght, K.C. (C. H. Howard and J. C. Boland with him), for the plaintiffs, appellants: The Industrial Standards Act, R.S.O. 1937, c. 191, sets out certain preliminary steps which

must be taken before a schedule can be declared to be in force under the Act, and the schedule here in question is illegal and void because those steps were not taken. The Act is of a most arbitrary nature, and its provisions must be strictly complied with.

The Minister must designate a zone and define an industry. He can act only upon the petition of representatives of employers or employees in such industry within the zone. His powers are defined in ss. 6 and 7. When all the prior conditions have been fulfilled, and a schedule is submitted to the Minister by the conference, it is his duty to consider and decide whether the schedule has been agreed to by a proper and sufficient representation of employers and employees. If he does so decide, he recommends the schedule, and it is only then that the Lieutenant-Governor in Council may declare the schedule to be in force, during pleasure, within the zone, and only a schedule so submitted and recommended can be declared to be in force. The Minister has no power to make a schedule of his own, or to deal with a document as he did in this case. The duty to form an opinion, under s. 8, as to the sufficiency of the agreement to the schedule, is a *quasi-judicial* one, to be exercised upon proper legal principles: *Pioneer Laundry and Dry Cleaners, Limited v. Minister of National Revenue*, [1940] A.C. 127, [1939] 4 All E.R. 254, [1939] 4 D.L.R. 481, [1939] 3 W.W.R. 567.

There was neither a conference nor a schedule within the meaning of the Act. The Minister cannot himself convene a conference; he has power only to authorize an officer to do so. No proper authorization under s. 6 was ever issued in this case, and the document purporting to be such an authorization is not in compliance with the Act, and is a nullity. The Minister had no power to leave it to the officer to decide the purpose for which a conference would be summoned. The officer therefore assumed a power which he did not have, when he undertook to determine the purpose of the conference.

The only notices sent out were subject to the same defect as the purported authorization. They contained no reference to the statute or the proposed creation of a schedule, or indeed that any matter under s. 7 would be dealt with. A person receiving such a notice would not know what the conference was for, or that his rights under the general law could or would

be taken away if he failed to attend. When the statute refers to a conference of employers and employees, it surely means all those concerned. [ROBERTSON C.J.O.: Too strict an adherence to the regulations might make the Act unworkable.] If the evidence had disclosed that an insignificant number had failed to receive notice, it might be overlooked, but no conference surely can be called, leaving hundreds of employees unnotified. It is true that the Act must be so construed as to make it workable, but at the same time every protection should be given to the people concerned: *Rex v. Belyea Bros. Ltd.*, [1937] O.W.N. 231. It is fundamental that a notice should disclose the purpose of the conference.

[KELLOCK J.A.: Were there no employees present at the conference?] The evidence is that some employees were present, but they were not listed as such. Thousands of employees in the industry, and a great many employers, received no notice of the conference. [ROBERTSON C.J.O.: It is of some consequence to know what pains were taken to see who was in fact present at the conference, since this would assist the Minister in deciding whether the schedule was properly agreed to. There is no provision in the Act for representation.]

The conference, after it had been summoned, never agreed to a schedule, or submitted it to the Minister. The meeting on 16th January was attended by a small number of persons, who adjourned to 19th January. On that date a committee was selected, composed of persons who were neither employers nor employees. Finally, on 8th February, certain persons appeared at a meeting, and some of them signed a schedule to be sent to the Minister. This last meeting was not a conference at all, and there was no authority in the persons present thereat to submit a schedule to the Minister. There is no power under the statute for the conference to delegate its powers to a committee. The persons present on 8th February were merely a group of individuals. The respondents must show either that all persons concerned were notified, or that they attended the conference, which would cure a defective notice.

The Lieutenant-Governor himself must be an actor in declaring the schedule to be in force. There is nothing in either The Lieutenant-Governor's Act, R.S.O. 1937, c. 13 or The Executive Council Act, R.S.O. 1937, c. 14, which waives or dispenses with the necessity for a definite declaration by the

Lieutenant-Governor himself, in which he must set out certain results. This schedule therefore has not been properly declared to be in force. [ROBERTSON C.J.O.: The Legislature surely intended it to be done in the recognized way, as it is always done.] We admit that the Minister recommended that the schedule should be declared to be in force, and that the Lieutenant-Governor in Council approved this advice, but he did not so declare.

We are entitled to sue the Advisory Committee. The Act, in s. 14(1), declares that it shall be deemed to be a corporation for certain purposes, including the collection of money, and we seek to restrain the committee from collecting money, through police court prosecutions and otherwise, and from paying out money.

The Act provides in s. 14(2) that the decision of the Board, on appeal from a decision of the committee, shall be final. This is a direct prohibition to an employee to have recourse to the courts and such a provision is certainly *ultra vires*. Regulation 9 gives power to the Board to compel an employer to pay arrears of wages, owing to an employee, to the Board, which may declare the whole or part of such wages forfeited to the Crown. This purports to give the Board power equal to that of a court, and since the Board is constituted by Provincial authority it cannot receive or exercise such power: *Re The City of Toronto and The Township of York*, [1937] O.R. 177 at 180, [1937] 1 D.L.R. 175, 46 C.R.C. 55. Our strongest objection is to the enforcement sections of the Act and the regulations.

The Act, regulations, schedule and order-in-council are *ultra vires* in that they impose an indirect tax. The tax sought to be imposed comes directly within the reasoning in *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575 at 583, C.R. [9] A.C. 296, 4 Cart. 7. It is a tax which raises the price to the manufacturer of his product, and he can then sell that product at an increased price to his customer. We refer also to *Attorney-General for British Columbia v. Canadian Pacific Railway Company*, [1927] A.C. 934 at 936, [1927] 4 D.L.R. 113, [1927] 3 W.W.R. 460.

The Act, regulations and schedule are also invalid because they encroach upon a field already occupied by the Dominion by The Combines Investigation Act, R.S.C. 1927, c. 26, as amended. The Dominion statute was held to be *intra vires* in

Reference re Combines Investigation Act and Section 498 of the Criminal Code, [1929] S.C.R. 409, [1929] 2 D.L.R. 802, 52 C.C.C. 223, affirmed [1931] A.C. 310, [1931] 2 D.L.R. 1, 55 C.C.C. 241, [1931] 1 W.W.R. 552.

The effect of the schedule here in question is to create a combine within the meaning of the Dominion statute. Although the schedule is limited to wages and hours of labour, it is specified to be in relation to a particular "commodity".

C. R. Magone, K.C., for the Attorney-General for Ontario, respondent: The contention that every member of the industry must receive notice would make the whole Act unworkable, because the overlooking of a single employer or employee would invalidate the whole proceedings. S. 4(2) clearly contemplates that there shall be representation of either employers or employees.

There was unquestionably a conference held and a schedule submitted thereby. Unless this Court finds as a fact that no conference was held, there is no jurisdiction to inquire into the manner of convening the conference. [ROBERTSON C.J.O.: The Minister's power to pass upon a schedule is contingent upon certain things having been done; if a large number of employers or employees were deliberately left out, surely the authority would not be in the Minister.] The function performed by the Minister is wholly administrative, and therefore cannot be inquired into by the Court. If a document called a schedule reaches the Minister through a person previously authorized by him to convene a conference, together with a report of what happened at the conference, the provisions of the Act have been complied with, and the Court cannot put itself in the Minister's place. The Minister in this case was of the opinion that the schedule submitted had been agreed to by a "proper and sufficient representation of employers and employees". The only condition precedent to the power of the Lieutenant-Governor in Council to declare a schedule in force is its approval and recommendation by the Minister. An order-in-council is an act of the Crown on the advice of its responsible Ministers, and if it is not beyond the powers granted in the Act, which is not alleged in this case, the Court cannot say that the Crown has acted imprudently: *Wilson et al. v. Esquimalt and Nanaimo Railway Company*, [1922] 1 A.C. 202, 61 D.L.R. 1, [1921] 3 W.W.R. 817, 28 C.R.C. 296; *Murdock v. Kilgour* (1915), 33

O.L.R. 412 at 420-421, 22 D.L.R. 752. The Lieutenant-Governor in Council is exercising a legislative power, and it is not for the Courts to inquire whether he has been misled by incorrect information: *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board*, [1941] A.C. 308.

This action is improperly constituted against the Advisory Committee, and the Attorney-General could not properly be added at the trial: *Smith v. Attorney-General for Ontario*, 53 O.L.R. 572 at 580, 588, [1923] 4 D.L.R. 1071, affirmed [1924] S.C.R. 331, [1924] 3 D.L.R. 189, 42 C.C.C. 215. A declaratory judgment is a discretionary remedy, and since there are prosecutions now pending in which the validity of the statute and regulations can be tested, an action for a declaration should not be entertained: *Dyson v. Attorney-General*, [1911] 1 K.B. 410; [1912] 1 Ch. 158. The Attorney-General represents the Crown in the courts, and where the only question raised is the constitutional validity of a statute, the Attorney-General is a necessary party to the action: *Beauharnois Light, Heat and Power Co. Ltd. et al. v. The Hydro-Electric Power Commission of Ontario et al.*, [1937] O.R. 796 at 817, 823, [1937] 3 D.L.R. 458. The Advisory Committee is not a corporation, but is only "deemed to be a corporation" for specified purposes. It is also within the protection of The Public Authorities Protection Act, R.S.O. 1937, c. 135, s. 13: *Johnston et al. v. Canadian Credit Men's Trust Association*, [1932] S.C.R. 219, [1932] 2 D.L.R. 462, 58 C.C.C. 1.

Where the functions exercised are ministerial, the Courts should not inquire into them: *Local Government Board v. Arlidge*, [1915] A.C. 120 at 133, 138. When an order-in-council recites that certain things have been done, the Court must take it that they have in fact been done. [ROBERTSON C.J.O.: Where the statute authorizes the Minister, and after him the Lieutenant-Governor in Council, to deal with a schedule submitted, must there not in fact have been a schedule submitted by the conference in accordance with the statutory provisions?] When the Lieutenant-Governor, by an order-in-council, states that all these things have been done, the Court cannot go behind that statement.

The Act, regulations and schedule are within the legislative competence of the Province under clauses 2, 9, 13 and 16 of s. 92 of The British North America Act. It cannot be held to be *ultra vires* unless it is found to be in pith and substance legis-

lation relating to trade and commerce. It is apparent from the statute that it is designed to regulate a particular trade, and this is *intra vires*: *The Citizens Insurance Company of Canada v. Parsons* (1881), 7 App. Cas. 96, C.R. [8] A.C. 406, 1 Cart. 265; *Attorney-General for British Columbia v. Attorney-General for Canada et al. (Natural Products Marketing Act Reference)*, [1937] A.C. 377, [1937] 1 D.L.R. 691, [1937] 1 W.W.R. 328, 67 C.C.C. 337.

There is no conflict with The Combines Investigation Act or with s. 498 of The Criminal Code, R.S.C. 1927, c. 36. It cannot be said that the Provincial Legislature is a party to a conspiracy, and conspiracy is the essence of an offence against either of those enactments. The Provincial legislation does not deal with a "commodity": *In re Rex v. Pulak*, [1939] 2 W.W.R. 219, 72 C.C.C. 222; *Attorney-General for Canada v. Attorney-General for Ontario et al. (Reference re Employment and Social Insurance Act, 1935)*, [1937] A.C. 355, [1937] 1 D.L.R. 684 [1937] 1 W.W.R. 312.

There is no indirect tax. The assessment provided for under the schedule, if it is a tax at all, is direct, because it is demanded from the person who is expected to pay it, and it is for Provincial purposes: *Workmen's Compensation Board v. Canadian Pacific Railway Company*, [1920] A.C. 184, 48 D.L.R. 218, [1919] 3 W.W.R. 167; *Shannon et al. v. Lower Mainland Dairy Products Board*, [1938] A.C. 708, [1938] 4 D.L.R. 81, [1938] 2 W.W.R. 604; *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Limited*, [1933] A.C. 168 at 175, 181, 188, [1933] 1 D.L.R. 82, [1932] 3 W.W.R. 639.

There is nothing in this statute giving judicial powers to the Board: *Re Ashby et al.*, [1934] O.R. 421 at 429, [1934] 3 D.L.R. 565, 62 C.C.C. 132.

The position as to the Minister's discretion is similar to cases under the Defence of Canada Regulations, where the Courts have refused to inquire into the sufficiency of the information upon which the Minister acted.

J. L. Cohen, K.C., for the Advisory Committee, respondent: An order-in-council at least raises a presumption of truth as to its recitals. The onus is on the appellants to prove the contrary. If a statute is clear as to any step that is to be taken, the Court has a duty to see that the statute is complied with, but when the statute is not clear as to what is to be done, and

where there is no specific or even general directive as to the manner of convening a conference, then obviously the purpose is to reserve to the Minister, and to the Lieutenant-Governor in Council, discretionary administrative powers. If bad faith is not indicated, the Court would usurp its powers by going behind the order-in-council. It is impossible for a litigant to bring out in court all the factors which might properly guide the Minister in following one course or another. The Court cannot substitute its judgment of what is practical for that of an administrative officer. [ROBERTSON C.J.O.: Suppose the appellants had brought evidence to the effect that no conference had been held at all, do you suggest that that evidence would not be receivable?] That would bring in the issue of bad faith. [ROBERTSON C.J.O.: If we can inquire whether there was any conference, can we not also ascertain whether a schedule was really approved by the conference and submitted to the Minister?] The function of the Court is limited to finding whether there was anything that a reasonable person might describe as a schedule. [ROBERTSON C.J.O.: What is there in the Act that gives the Minister the sole power to determine whether a schedule has been submitted?] The Minister deals with the whole question before approving the schedule and recommending it; he would not approve it without examining it minutely. The onus is on the appellants to show that there was no conference, or no schedule approved thereby.

The pivotal section of the Act is s. 8. Everything preceding that section deals only with administrative machinery. When s. 6 authorizes an officer to convene a conference, that conference is convened by the officer for the Minister. S. 7 must be read in conjunction with ss. 2, 3, 4 and 5. If the conference was properly convened by the notice inserted in the newspapers, then everyone received notice. Nothing done afterwards can alter that fact. Custom tailors were definitely excluded because nothing in the schedule affects them.

[ROBERTSON C.J.O.: If the schedule must be adopted by a conference, what is the situation resulting from the adjournment of the conference without preparing one?] The conference, having been convened, is master of its own procedure. The list of those present on 8th February includes everyone who was present on 19th January, so far as the interests represented are concerned. [ROBERTSON C.J.O.: The suggestion is that the

schedule was not the act of the conference, but that of some members of the conference.] [GILLANDERS J.A.: The whole point of the case is whether or not the meeting on 8th February was a conference.] It was the intention of the Legislature that when a conference is convened by an officer, duly authorized, it is in effect convened by the Minister so that he can ascertain the facts respecting a given industry, and so that there can be negotiations as to any of the matters which, according to s. 7, may be dealt with in the schedule. It is by means of such investigation and negotiations that the Minister can know how to exercise the authority vested in him by s. 8, either by approving and recommending the schedule or by refusing to approve it.

In construing statutes, the common-sense interpretation must be the deciding factor; obviously no statute should be so interpreted that it becomes unworkable. Maxwell, *Interpretation of Statutes*, 8th ed., p. 208; Craies, *Statute Law*, 4th ed., p. 454.

A. G. Slaght, K.C., in reply: The two principal cases as to the powers of the Court are *Dyson v. Attorney-General*, [1911] 1 K.B. 410; [1912] 1 Ch. 158, and *Re Price Brothers and Company and The Board of Commerce of Canada*, 60 S.C.R. 265, 54 D.L.R. 286 at 290, 291, [1920] 2 W.W.R. 721. The respondents are asking the Court to take too wide a view of the Minister's powers. The whole statute is based upon the agreement of the parties, and upon the holding of a properly constituted conference.

S. 13 of The Public Authorities Protection Act, R.S.O. 1937, c. 135, is in no way applicable to this case; the Advisory Committee does not come within that section.

Our position throughout has been that when an officer undertakes to call a conference of employers and employees, all persons within those categories must be notified. There are fatal defects in the schedule because of non-compliance with the preliminary requirements.

Cur. adv. vult.

30th June 1943. ROBERTSON C.J.O.:—This is an appeal by the plaintiffs in the action from the judgment of Mackay J., dated 5th September 1942. It should be stated at the outset that the plaintiff, The Tolton Manufacturing Co. Ltd., was not

an appellant, although nothing has been done formally to remove it as a plaintiff in the action. The other plaintiffs are the only appellants. The Attorney General for Ontario appeared, as notice had been given of the intention of the appellants to question the validity of certain parts of The Industrial Standards Act, R.S.O. 1937, c. 191, and of the regulations made pursuant thereto. The Minister of Justice, although notified, was not represented on the hearing of the appeal.

The nature of the issues involved, and the facts from which they arise, have been set forth and discussed in the judgment of the learned trial judge and by the other members of this court, and it is unnecessary for me to repeat them.

The statute in question is of a somewhat unusual character. It provides for the employers and employees in any industry, within a designated zone, being called into conference for the purpose of investigating and considering the conditions of labour and the practices prevailing in such industry, and for negotiating with respect to any of the matters enumerated in s. 7 of the statute. These matters include hours of work, rates of wages, provision for over-time work, classifying employees and employers. The conference of employers and employees is authorized to submit to the Minister of Labour in writing a schedule of wages and hours and days of labour for the industry affected, and the schedule may also provide for any of the several other matters set forth in s. 7. By s. 8, if, in the opinion of the Minister, the schedule of wages and hours and days of labour submitted by the conference is agreed to by a proper and sufficient representation of employers and employees, he may approve thereof, and upon his recommendation the Lieutenant-Governor in Council may declare such schedule to be in force during pleasure, or for the period, not exceeding twelve months, stipulated in such schedule, within the designated zone or zones, and it is to be binding upon the employers and employees in the industry referred to in such schedule.

The statute further proceeds to provide for an advisory committee, to be established by the Minister, of not more than five members, and the advisory committee may hear complaints of employers and employees to whom the schedule applies, and may generally assist in carrying out the provisions of the Act and regulations. Provision is also made in the statute for imposing penalties by fine and imprisonment upon employers or

upon employees who contravene the provisions of the schedule, by proceedings under The Summary Convictions Act, R.S.O. 1937, c. 136.

It will be seen that the conference of employers and employees, and the schedule submitted by that conference, are the essential foundation upon which whatever may be done under the statute must rest. It is important also to observe that from this conference, and the schedule submitted by it to the Minister, there may arise liability to fine or imprisonment on the part of any employer or employee engaged in the industry within the designated zone. The obligation to comply with the schedule, once it has been submitted to and approved by the Minister, and has been declared to be in force by the Lieutenant-Governor in Council, is binding upon every individual employer and employee within the designated zone—on those who may not have attended or been represented at the conference, or may have opposed the submission of the schedule, equally with those who may have actively supported its submission, and all are equally liable to fine and imprisonment for contravention of the schedule.

It is obvious that matters that are left in the hands of the Minister by the statute are of great importance, and are essential to its successful operation, and with these matters, and with the action to be taken by the Lieutenant-Governor in Council, in my opinion, the Court has no right to interfere. It was, indeed, submitted by counsel for the Advisory Committee that once a schedule had been approved by the Minister, and had been declared to be in force by the Lieutenant-Governor in Council, the Court could not interfere, no matter what the origin of the schedule had been, and that no one could question in any court the result of the action of the Lieutenant-Governor in Council, or enquire into anything that had preceded it. With this I do not agree. The authority of the Lieutenant-Governor in Council can be exercised only in respect of a schedule whose origin is that prescribed by the statute, and is quite independent of any action of the Lieutenant-Governor in Council. In my opinion, it is essential to a valid declaration by the Lieutenant-Governor in Council that there should have been a conference of the employers and employees in the industry. It is essential that the conference should have submitted to the Minister a schedule in writing, within the description of s. 7, and unless and until these essentials are fulfilled, no foundation whatever

exists, either for the approval of a schedule by the Minister, or for the declaration of the Lieutenant-Governor in Council that a schedule is in force. Neither Minister nor Lieutenant-Governor in Council has authority under the statute to act at all, unless there is the conference for which the statute provides, and they can then act only in respect of a schedule submitted by the conference. Whether or not these essentials existed is a proper subject of enquiry by the Court, and the Court may, by appropriate proceeding, declare the invalidity of an order-in-council that is not based upon them.

The statute does not prescribe how a conference shall be called. There is nothing in the Act to say how notice shall be given, or what the length of notice is to be. Such matters, I think, are left to the Minister or to the officer authorized by him to convene the conference. No doubt, the manner in which a conference may best be called will differ in respect of different industries, and for different areas. Neither does the statute prescribe how a conference is to proceed to prepare and submit a schedule in writing to the Minister. The statute does not say that all the persons in attendance at the conference must agree upon a schedule. No way of taking a vote is provided, nor is there any provision that a majority or any specified proportion of the conference must agree in submitting a schedule. There is nothing in the Act to say how the voice of an employer of 1,000 hands will count as against that of an employer of only 100 hands. There is no provision for voting by proxy. The solution for any difficulty that might seem to arise from these omissions in the statute is, I think, to be found in the provision of s. 8, that "If, in the opinion of the Minister, the schedule of wages and hours and days of labour submitted by the conference is agreed to by a proper and sufficient representation of employers and employees, he may approve thereof".

With respect to the manner of calling a conference, I am not to be understood, however, as saying that, in my opinion, no matter what method the Minister, or the officer authorized by him, may adopt for convening a conference, such persons in the industry as happen to be gathered together are entitled to be considered a conference. There may, in a given industry, be such failure to give notice in a manner likely to reach the persons interested, or the notice may be so short or so indefinite, that it would amount to a fraud upon the statutory pro-

vision to treat what was done as the convening of a conference of the employers and employees in that industry. In my opinion, no ground at all is shown in this present case for considering the method of convening the conference as insufficient in any particular. It is to be observed that there was no evidence offered of persons who said that they were interested and would have attended if they had had notice, except in the case of certain employers described as "custom tailors", who would appear not to be affected by the schedule. The evidence as to notice to them is not entirely satisfactory, and it would be difficult to find that they had the notice that was given to employers generally in the industry, and yet the description of the industry for which the conference was called would seem broad enough to include them. Further, that they were so included would seem to have been the opinion of the Advisory Committee, or of some of its members, for notices were subsequently given requiring the persons engaged in business as custom tailors to contribute, with the other employers within the zone, to the expenses of the Advisory Committee. Notwithstanding this confusion, however, I think the proper conclusion is that it was not intended to include the custom tailors as within the description of the industry. It seems clear that the schedule does not affect them, and no doubt the proper action was taken when they were so informed and were relieved from any contribution to the expenses of the Advisory Committee.

Coming then to the conference itself, it is objected that, while a few employees were present at the first meeting, the only substantial representation of employees at the conference was that afforded by the attendance of two men from New York, who were not themselves employed in the industry, but who were, or claimed to be, authorized by the Amalgamated Clothing Workers of America, to act as representatives of the employees. These men were the only signers of the request for a conference, by which proceedings were initiated, and they alone signed the schedule on behalf of employees at the conclusion of the conference.

Everyone in these days is aware that for many purposes, and on many occasions, persons occupying such positions or offices, and claiming the same authority as the men acting in this case as the representatives of the employees, are conceded the status they claim. I do not question that, for some purposes,

they are probably more capable of taking care of the interests of the employees than are the employees themselves. In a matter, however, such as the proceedings under the statute now in question, which, it is contemplated, will result in obligations upon employees, it is no more than proper that the authority of the representatives should be a real one. If it was necessary for the disposition of this case that an affirmative finding should be made that the two men who throughout claimed to be, and acted as, the representatives of the employees in the industry, had in fact due authority for so doing, I should have difficulty in making that finding upon the evidence before us.

The matter of the burden of proof is of considerable importance in this case. Appellants seem to have proceeded on the assumption that the regularity of the proceedings for the preparation and submission of a schedule having been attacked, the authority of certain persons to act in these proceedings in the characters in which they assumed to act, must be established by the respondents. I am not able to accept that view. To accomplish any worth-while end, appellants must get rid of the order-in-council declaring a certain schedule to be in force. The existence of the order-in-council is not questioned, but its validity is attacked by the appellants on several grounds. In this attack appellants make allegations of the usurping of authority by individuals to act for others, of failure to comply and of imperfect compliance with the provisions of The Industrial Standards Act, and of irregularities in the proceedings required to be taken for the submission of a schedule before action can be taken by the Lieutenant-Governor in Council. Having made these allegations as the foundation of their attack upon the order-in-council, the burden is upon appellants to prove them. Until they do so the maxim *omnia praesumuntur rite esse acta* confronts them. *Reg. v. Reynolds*, [1893] 2 Q.B. 75; *Palmatier v. McKibbin* (1894), 21 O.A.R. 441. Appellants have, I think, failed to bring the necessary evidence, both with respect to the convening of a conference, and with respect to the conference itself, the representation thereat and the proceedings thereof. It would be strange, indeed, if the Court should declare the order-in-council in question to be invalid on the ground that because of insufficient notice of the conference or unauthorized representation thereat, no proper schedule had been submitted in accordance with the statute, until it had been established by

proper evidence that what appellants charge is true. While, therefore, it is, in my opinion, essential for the proper submission of a schedule by a conference, under s. 7 of the statute, that the conference should have been petitioned for by persons who are in fact representatives of employers or employees in the industry, and that the conference itself should be a real conference of employers and employees, and not a conference of persons who, without due authority, have constituted themselves the representatives of employers or employees, in an action such as the present the appellants, who attack the proceedings, and allege their invalidity because of the lack of these essentials, must support their case with proper and sufficient evidence of what they have alleged. That, I think, appellants did not seriously attempt to do, and even on the argument of the appeal appellants did not assume this onus. In any event, I can find no evidence on the record that will support a finding that appellants have proved their allegations. The respondents, although I think not called upon to do so, did adduce some evidence directed to the establishing of the authority of certain persons who assumed to act as representatives of employers and employees, and otherwise to supporting the regularity of the proceedings, but if the burden of proof in this respect had rested upon the respondents, I should be inclined to the opinion that they had not met it. Holding, however, the opposite opinion as to the burden of proof, I think the appellants have not made out their case in these matters.

What I have said as to the burden of proof applies equally to the proceedings preliminary to the conference, to the proceedings of the conference itself and to the submitting of the schedule in question. At the opening meeting of the conference a number of persons were present, both employers and employees, and others who claimed to be the representatives of either the one or the other. The manufacturing establishments from which these several persons came, or the employers or employees of which they claimed to represent, were located in but a few municipalities in the Province, while the whole Province had been designated as one zone for the purpose of this industry, and one may be inclined to suspect that a substantial part of the industry in the Province was not represented at the conference because of want of notice. There is no evidence, however, of the existence of branches of the industry in places

for which no representation was claimed, and it may be that this particular industry is established in but a few places, and mainly in Toronto and Hamilton. In the absence of evidence that a substantial part of the industry was ignored in convening the conference, which might, conceivably, have the effect of invalidating the whole subsequent proceeding, the situation would appear to be fully met by the provision of s. 8, which requires only that there should be, in the opinion of the Minister, a proper and sufficient representation of employers and employees at the conference submitting the schedule.

Much argument was addressed to us with respect to the final meeting when the schedule was sent on to the Minister. A committee had been appointed at the opening meeting of the conference, but the minutes are silent as to the duties and powers of that committee, and when the opening meeting adjourned no provision was made for the conference assembling again. The preparation of the schedule in question was done by the committee in several meetings, and it would appear that the committee were not unanimous in regard to it. There was no formal notice of the re-assembling of the conference to deal with the schedule, but the members of the committee present at its last meeting were each instructed to notify those whom they represented of the meeting of the conference to consider the schedule. This was certainly a most informal manner of calling an important meeting of the conference, but there is no evidence that anyone interested was unrepresented at the final meeting of the conference because of want of notice. On the contrary, it would appear from an examination of the list of names of those actually present, that there was almost a full attendance of the employers and employees who attended the opening meeting, or of some one to represent them.

Although the statute provides that the conference may submit a schedule, there does not appear to have been any motion before the conference for the adoption or submission of any schedule. No vote was taken, but those who favoured the submission of the schedule were invited to sign a memorandum at the foot of it. The signatures so appended to the schedule do in fact represent a large majority of those in attendance at the final meeting, and these persons represented, or claimed to represent, a large majority of both employers and employees in the industry. In default of any provision in the statute, or in

the regulations made under it, governing the procedure at a conference, I am of the opinion that the Court cannot properly say that what was done at the final meeting was not the submitting of a schedule by the conference. In my opinion, therefore, the attack of the appellants upon the proceedings leading up to and including the submission of the schedule to the Minister, fails for want of evidence to support the grounds of attack. There was no doubt a good deal of informality, and it may be that there was much unwarranted assumption of authority on the part of certain persons, particularly on the part of those who assumed to represent the employees, and who were the only signatories of the schedule on behalf of the employees at the final meeting. I am not to be understood as suggesting, for one moment, any approval of slovenly or irregular procedure, or the loose assumption of authority in proceedings under this statute, but if such things are relied upon as invalidating the order-in-council their existence must be proved by the party who alleges them, before the Court can declare invalid an order-in-council that rests upon these preliminary proceedings.

Argument was addressed to us for the appellants as to the constitutional invalidity of the Act itself, and of certain of the regulations. This aspect of the case was discussed by the trial judge, and is dealt with in another judgment on this appeal, and I say nothing in regard to it other than that I am unable to accept the contentions of the appellants in this respect, all of which are, I think, covered by decided cases. In this, as well as on all other grounds, the appeal fails.

Before parting with the case, I desire to call attention to one clause in the schedule itself, of the validity of which I have doubts, although it was not made the subject of special argument. The statute, in s. 4, authorizes the Minister from time to time to designate the whole of Ontario, or any part or parts thereof, as a zone or zones for any business, calling, trade, undertaking and work. The Minister designated the whole of the Province of Ontario as one zone for the industry in question. The schedule submitted and approved by the Minister, and declared to be in force by the order-in-council, provides, first, for regular working periods, and for overtime hours and rates, and then proceeds to establish minimum rates of wages at so much per hour, varying according to the operation upon which the employee is engaged. This is covered by two long

paragraphs, with many sub-divisions, the paragraphs being numbered 3 and 4. Then follows para. 5, with the heading "Minimum Rate for Second Area", and the paragraph reads as follows:

"5. The minimum rates for that part of the Province of Ontario other than the Counties of Ontario, York, Peel, Halton and Wentworth, may be twelve and a half per cent. less than the rates hereinbefore set out".

I doubt whether, when one zone has been created, the statute authorizes the establishment of different rates for different areas in that zone. By s. 4(2), the representatives at a conference have authority, upon the approval of the Minister, to divide the area designated as a zone into separate zones. It is another matter to divide one zone into different areas, with different rates of pay. There is the further objection that para. 5 does not definitely establish any minimum rate. The minimum rates for every part of the Province but the excepted counties may be twelve and a half per cent. less than the rate thereinbefore set out, but there is no declaration what they shall be. The matter was not argued, however, and I pursue it no farther, but I do not desire to appear to have approved what was done in this respect.

I agree that the appeal should be dismissed, with costs.

GILLANDERS J.A.:—The Industrial Standards Act, R.S.O. 1937, c. 191, amended by Statutes of Ontario 1939, c. 21, makes provision for the formulation of a schedule of wages, hours, and days of labour in any industry in a designated zone or zones in the Province. This litigation arises out of steps taken to establish such a schedule under the statute for the men's and boys' clothing industry in the Province of Ontario.

The relevant facts set out in the reasons of the learned trial judge, reported in [1942] O.R. 518, [1942] 3 D.L.R. 705, 78 C.C.C. 191, need not be repeated. The plaintiffs, other than the Tolton Manufacturing Co. Limited (which withdrew after the first trial), appeal to this Court on various grounds from the judgment of Mr. Justice Mackay dismissing the action. They urge: (1) that the Act in question and regulations passed thereunder are *ultra vires* of the Ontario Legislature; (2) that in any event the alleged schedule in question is invalid as not having

been formulated according to the statute and the regulations passed thereunder.

As to the submission that the statute in question and the regulations thereunder are *ultra vires* of the Legislature of the Province, I am in agreement with the reasoning and conclusion expressed by the learned trial judge. To repeat his conclusions: "I am respectfully of opinion that The Industrial Standards Act is within the competence of the Provincial Legislature under s. 92 of The British North America Act, and that the statute is clearly regulatory in essence and in objective, and not penal. It aims to establish a floor for wages, a ceiling for hours, and practical machinery for supervision of the same. In other words, the pith and substance of the Act is to regulate particular industries entirely within the Province, and therefore it is *intra vires* of the Provincial Legislature".

The submissions most strongly pressed on the argument of the appeal related to alleged fatal non-compliance with certain statutory provisions which are said to be conditions precedent to the formulation of a binding schedule. S. 6 of the Act provides as follows:

"6. The Minister may, upon the petition of representatives of employers or employees in any industry within a designated zone or zones, authorize an officer to convene a conference of the employers and employees in such industry for the purpose of investigating and considering the conditions of labour and the practices prevailing in such industry and for negotiating with respect to any of the matters enumerated in section 7".

S. 7, after providing that the conference may submit to the Minister in writing a schedule of wages and hours and days of labour for the industry affected, proceeds to specify in more detail various matters that may be covered in such schedule.

S. 8 provides as follows:

"8. If, in the opinion of the Minister, the schedule of wages and hours and days of labour submitted by the conference is agreed to by a proper and sufficient representation of employers and employees, he may approve thereof and upon his recommendation the Lieutenant-Governor in Council may declare such schedule to be in force during pleasure, or for the period not exceeding twelve months stipulated in such schedule, within such designated zone or zones as may be prescribed and to be

binding upon the employers and employees in the industry referred to in such schedule”.

The appellants point particularly to these sections and submit that certain preliminary steps therein set out are essential conditions to the effective establishment of a schedule. Briefly stated, the objections raised are the following submissions:

(a) that there was no proper or sufficient petition on which the Minister could authorize a conference to be convened;

(b) that the purported authority given by the Minister to convene the conference was defective and insufficient;

(c) that in any event a conference was never properly convened; that proper notice was not given to all interested parties, and in that in fact no conference of employers and employees in pursuance of s. 6 of the statute was ever called together or met for the purposes mentioned in this section;

(d) that no schedule of wages and hours and days of labour was ever submitted by a conference to the Minister which he could consider, and, if satisfactory, approve, under the provisions of s. 8;

(e) that if any schedule was submitted by a conference it was not agreed to by a proper and sufficient representation of employers and employees to be approved.

In considering these objections it is desirable to have in mind to what extent the steps taken or omitted should be reviewed by this Court. Those steps which the statute in terms requires to be taken prior to a schedule being brought into force must be taken before the schedule can be made effective. The schedule must be submitted to the Minister by the conference. The conference must have been convened on the authority of the Minister upon petition as provided in s. 6. The statute having expressly provided for these steps to be taken, only a schedule developed in accordance with the express provisions of the statute can be submitted to the Minister for his approval.

Although the facts were different, the importance of conditions contained in a statute is shown in the case of *Errington et al. v. Minister of Health*, [1935] 1 K.B. 249. Where, however, the manner of carrying out these steps is not specified by the statute, and in so far as they are purely administrative in character, the procedure followed should be regarded as having been adopted in the exercise of a discretion with which this

Court should be slow to interfere: *Local Government Board v. Arlidge*, [1915] A.C. 120.

As to the petition, some criticism was advanced in this respect but was not strongly pressed by counsel for the appellants. The form of the petition is not specified by the statute, and it is sufficient to say that ample ground was shown by the evidence, on which the Minister might authorize the convening of a conference.

It was urged that the authority to convene the conference should have specified whether the conference was being convened for the purpose of investigating and considering the conditions prevailing in the industry, or for negotiating with respect to the matters enumerated in s. 7, or for both of these purposes as set out in s. 6. The step was a purely administrative one and is not open to serious objection on the ground urged.

It was strongly urged that no conference was properly convened. Mr. Slaght did not contend that, to fulfil the provision as to convening the conference, it was necessary that the parties should actually assemble at the conference, but he did urge that it was necessary that interested parties should get proper notice, and that this had not been done. Notices of the conference were published in the *Globe and Mail*, a morning daily newspaper in Toronto, the *Toronto Star*, an evening daily newspaper published in Toronto, and the *Toronto Hebrew Journal*. Counsel for the respondent committee relies on these newspaper advertisements as providing sufficient notice of the convening of the conference. However, in addition to such advertisements, letters or notices were sent by mail to a large number of employers in the industry. The names of the employers to whom notices were sent were obtained from a list said to have been kept in the Provincial Department of Labour. This list apparently had been built up from experience in the administration of a previous schedule in the same industry, and from other sources of information, and included most of the employers engaged in the industry. It did not include so-called "custom tailors". The position of persons in this classification became of some importance at the trial and on the argument of this appeal, and will be discussed later. Individual notices were not sent to employees, but two known unions of employees in the industry were advised. It is contended that

the persons receiving such notices by mail were not exhaustive of the employers in the industry, mainly by reason of the fact that "custom tailors" were not notified, and that in any case the notices were insufficient in that they were not sent to individual employees concerned in the negotiations. It is contended that it should be shown that notices were sent to all parties interested. Giving notice of the calling of the conference was an administrative matter. The public advertisements published in the press were sufficient in form. In the circumstances here present, this Court should not interfere with the discretion exercised in convening the conference by this method.

The most troublesome question arises out of the development and submission of the schedule in question. It was submitted that in any event the conference which had been called never submitted a schedule to the Minister. Under s. 7, "The conference may submit to the Minister in writing a schedule". This is the schedule, and the only schedule, which, in pursuance of s. 8, the Minister may approve. The Minister having no authority himself to propound a schedule or to amend the schedule submitted to him, and it being a provision of the statute that the schedule in question is to be submitted by the conference, it becomes of importance to ascertain whether or not the schedule in question was in fact submitted by the conference. This is more than a matter of administration or procedure; it is a specific statutory requirement, on which the validity of the schedule depends.

The newspaper notices convening the conference fixed the place and time of meeting. Following a request by several of the interested parties, the conference was on that date adjourned to 19th January. On 19th January the conference reassembled, and a committee was selected. The manner of selection of the committee in question was somewhat informal, but it was apparently set up with a view to having the various interests present represented. At the conference, and on the committee, persons purporting to be representatives of both employers and employees were recognized as such.

It is urged that s. 6, referring to a "conference of the employers and employees in such industry", requires just that, and that it is not a compliance with this section to include in such conference representatives of employers or employees who are themselves in fact neither employers nor employees. That would

be a much too restricted construction of the statute to adopt. The Act, I think, contemplates that persons interested may have representatives act on their behalf. S. 4(2) speaks of "representatives of employers and employees in any conferences to be held as hereinafter provided". There being no provision prohibiting employers and employees from appearing by representatives, and such representatives from being recognized by the conference, it cannot be said that this was not in compliance with the statute.

In view of what later occurred, and the submissions made to this Court, it becomes of some importance to see in a general way how the committee set up on 19th January was made up. Mr. Fine, the Industrial Standards Officer of the Department of Labour, was chairman. Membership included the solicitor for the plaintiff the Ontario Boys' Wear Limited, who was appearing at the conference on behalf of that company and of the Ontario Pants Manufacturers Association, said to be made up of some twelve firms, including two of the plaintiff firms. It is said that from previous negotiations he was recognized as the active spokesman for various interests opposed to the making of a schedule in Ontario similar to that in force in Quebec. Also on the committee were the solicitor for the Amalgamated Clothing Workers Union together with two officials of that union; Mr. John K. Abraham, secretary-treasurer and director of the plaintiff firm the Ontario Boys' Wear Limited; Mr. Tolton of the Tolton Manufacturing Co. Limited, an employer, which firm was originally a plaintiff in this action but withdrew after the first trial; Mr. Aaron Horowitz, a plaintiff in this action and a partner in the firm of Cornwall Pants and Prints Clothing Company; Mrs. Finch, representing the National Clothing Workers Union, comprising employees engaged in the industry; Mr. Learie, representing a group of some thirty-five employers, and several other representatives of interested employers.

It was said by one witness that there were approximately 5,000 employees engaged in the industry in Ontario. Mr. Fine places the total number of employees at 4,723 and indicates that the employers who were represented at the conference employed some 3,683 employees. If one concedes that the various members of the committee were in fact the representatives of the firms, associations, and persons, whether employers or em-

ployees, for whom they appeared, the committee was highly representative of those interested in the proceedings.

This committee held meetings on some nine days and finally, on 7th February, the preparation of a schedule having been completed in accordance with the views of the majority of the committee, the conference was reconvened for the next day. This was done in a very informal manner by notifying committee members to this effect and asking them to give notice of this fact to those whom they represented. The next day, 8th February, when the conference reassembled in pursuance of this notice, representatives of the plaintiff firms were present, with the exception of Mr. Horowitz, who had represented the partnership in which he was interested. He wrote a letter dated 7th February to the chairman, indicating that he had notice of the conference the next day and that it was impossible for him to be present at that time. He, however, stated clearly what his position was. The committee reported the schedule which had been drawn, and the chairman invited those present who desired to sign a memorandum attached to the schedule. This memorandum is addressed to the Minister of Labour and purports to be from the "undersigned members of the conference"; it submits the schedule and requests the Minister's approval thereof and his recommendation that it be put in force. This is signed by various employers and for the Amalgamated Clothing Workers of America by two of the officials of that union.

The contention that the schedule so submitted was not the schedule of the conference is based on several grounds. Objection is taken at the outset to the constitution of the conference. It is urged that even if the statute contemplates that employers and employees may appear thereat by a proper representation, at least some of the representatives who purported to appear and act on behalf of employers and employees lacked authority so to do. In this connection the authority of two officials of the Amalgamated Clothing Workers of America, neither of whom was actually an employee, to speak on behalf of all members of the union, is questioned. It is said that this union, comprised of workers in this industry, represents some 3,625 of the employees out of a total of approximately 5,000 engaged in this industry. It is urged that the evidence not only fails to show that the representatives in question had any authority

to act for these employees in this matter, but indicates affirmatively that they did not possess such authority. The authority of Mr. Learie in representing various employers is likewise questioned. In this connection the onus is on the plaintiffs to establish affirmatively that the representatives whose authority is questioned were not in fact acting on behalf of the interests they purported to represent. It should also be kept in mind that no complaint is being made in this action by any of the parties whose representation is questioned.

There is evidence to indicate that from previous experience and negotiation those interested in the industry and in negotiation of matters connected therewith were known to each other. The authority of the representatives present was accepted by the conference and is not being questioned now by any of the principals. That was a matter within the authority of the conference and, it not being shown here that any of such representatives acted without authority or that their acts are being questioned or have been repudiated by such principals, or that the plaintiffs have been injured, the objection lacks substance.

A more serious objection turns on the submission that the conference, which adjourned on 19th January when the committee was formed, never was in fact reassembled, and that the schedule drafted by the committee was never in fact approved by a conference and, therefore, no schedule was ever submitted to the Minister by the conference.

The procedure followed is clearly open to technical criticism. The original conference having been called by notices published in the press in reasonable time, and the conference, as such, having adjourned when the committee was set up, it would have been desirable to reassemble the conference by some similar notice rather than in the very informal manner and in the short time adopted. If by reason of the procedure followed any of these plaintiffs had been deprived of a right they were entitled to exercise, and had suffered injury therefrom, or if there were evidence of bad faith by reason of which any of the plaintiffs had been deprived of some material right, the Court might well view the objection as material.

The proceedings here were conducted in good faith. The plaintiffs were not deprived of any substantive right. The committee which drafted the schedule was widely representative of all interests concerned. A reading of the evidence leads one to

think that the most formal notice of the reconvening of the conference would not, at that stage of the proceedings, have made any material difference in the result. In the circumstances the question is one of procedure, with which the Court should not interfere.

The schedule submitted by the conference was approved by the Minister. He was entitled to do so if in his opinion it was "agreed to by a proper and sufficient representation of employers and employees". It is clear from the record that there was some evidence before him. He probably had knowledge of many facts about the industry not shown in the record at all. There being evidence before him, it is not for this Court to review his discretion as to what was "proper and sufficient representation". His duty was probably *quasi-judicial* but, there being evidence on which he could act, his discretion is not subject to review here.

In *Wilson et al. v. Esquimalt and Nanaimo Railway Company*, [1922] 1 A.C. 202, 61 D.L.R. 1, [1921] 3 W.W.R. 817, 28 C.R.C. 296, Mr. Justice Duff (as he then was) sitting as a member of the Privy Council and writing the judgment of the Board, discusses a somewhat similar question. It was held that where the Lieutenant-Governor of a Province has authority by statute to issue Crown grants upon "reasonable proof" of certain facts, his function is judicial, but he is not bound to follow the rules regulating proceedings in a court of justice, and if there is before him some proof of the necessary facts, it is within his discretion to determine that there is "reasonable proof".

There was much evidence advanced at the trial, and considerable argument on the appeal, relating to so-called "custom tailors". The designation and definition of the industry by the Minister of Labour does not mention or define "custom tailors", but one would think it broad enough to include all tailors engaged in the production of the type of clothing defined, except those giving employment to not more than four workmen. It was argued that in the trade "merchant tailors" mentioned in the designation do not include "custom tailors" and that in custom tailoring the designing, cutting, and all operations in the production of the garment are done by one man as distinguished from a garment "manufactured" by the section system. However that may be, I think the designation broad enough to in-

clude so-called "custom tailors" and, if so, they were given notice of the conference by the notice published in the press. Counsel for the Advisory Committee says that it was never intended to include "custom tailors" in the schedule; that it is not intended to apply to them, and that certain persons so engaged, who subsequently collected assessments thinking they were bound by the provisions of the schedule, have been notified to return the assessments so collected because the schedule was not applicable in their case.

It should be noted that counsel for the Advisory Committee stated unequivocally that in the view of the Committee the schedule does not apply to such persons. In any event, no person in this category is complaining in this action. There is nothing shown in this connection which assists the plaintiffs in attacking the schedule.

In the result, the appeal should be dismissed with costs.

KELLOCK J.A.:—This is an appeal by the plaintiffs, other than the Tolton company, from the judgment of Mackay J., sitting without a jury, dated 5th September 1942, dismissing the action. The Tolton company discontinued at an earlier stage of the proceedings. The appellants seek in the action a declaration that The Industrial Standards Act, R.S.O. 1937, c. 191, and certain regulations made thereunder, are *ultra vires*, an injunction against enforcement of a certain schedule approved by order-in-council passed pursuant to the Act, and damages. It is also contended in any event that the schedule itself was not properly brought into being having regard to the provisions of the Act itself.

The grounds upon which it is contended that the Act and certain of the regulations are *ultra vires* are, (1) that they provide for indirect taxation, and (2) that they are legislation in a field occupied by The Combines Investigation Act. With reference to the first ground, the appellants contend that the provisions of s. 7(l), and regulations 16 and 17, by which the scheme provided for in the section may, with the approval of the Industry and Labour Board, provide for assessing employers and employees to provide revenue for the enforcement of the schedule and for authorizing the Advisory Committee to collect such assessments, and out of the revenue so collected to make expenditures for administration and enforcement, constitute an

indirect tax. In my opinion these provisions may be supported under s. 92(13) and (16) of the British North America Act, as fees for services rendered by the Province or its authorized instrumentalities: *Shannon et al. v. Lower Mainland Dairy Products Board*, [1938] A.C. 708 at pp. 721 and 722, [1938] 4 D.L.R. 81, [1938] 2 W.W.R. 604. The assessment provided for by the Act being *intra vires*, no objection to regulations 16 and 17 can be sustained on the ground that the employer is required to deduct the assessment of employees from their wages: *Forbes v. Attorney-General for Manitoba*, [1937] A.C. 260, [1937] 1 All E.R. 249, [1937] 1 D.L.R. 289, [1937] 1 W.W.R. 167. I do not consider it necessary to consider the objection urged to regulation 9 on the ground that it provides for a forfeiture. If there be any objection to it, the regulation is severable. I consider that it will be time enough to deal with this regulation when occasion arises following any exercise by the Board of the power purported to be given thereby which may be objected to. This power in no way concerns the appellants in this action.

The second contention, that the Act is *ultra vires* as in conflict with The Combines Investigation Act, R.S.C. 1927, c. 26, as amended by 1935, 25-26 Geo. V, c. 54, and 1937 1 Geo. VI, c. 23, is, in my opinion, not tenable. Undoubtedly, the Legislature would have authority to enact anything which is provided for in the schedule in question. I do not understand how the formulation of the legislation by those familiar with conditions in the industry, which, in my opinion, is what ss. 6 and 7 amount to, renders the Act *ultra vires* as legislation in a field occupied by The Combines Investigation Act, or constitutes the act of the persons formulating the legislation for the consideration of the Minister of Labour and the Lieutenant-Governor in Council a "combine" within the meaning of the Dominion Act.

In considering the contention that the schedule is invalid by reason of failure to comply with the provisions of the Act itself, it will be necessary to consider these provisions and the steps taken, as disclosed by the evidence.

By s. 6 the Minister of Labour is empowered, upon the petition of representatives of employers or employees in any industry within a zone defined by him under the authority of s. 4, to authorize the calling of a conference of the employers and employees in such industry, for the purpose of investigating and considering the conditions of labour and the practices prevail-

ing in such industry, and for negotiating with respect to a number of matters specified in the following section, including hours of labour and rates of wages. Under s. 7 the conference thus called may submit to the Minister a schedule, in writing, dealing with the matters specified in the section. By s. 8 the Minister, if of opinion that the schedule submitted by the conference is agreed to by a proper and sufficient representation of employers and employees, may approve, and upon his recommendation the Lieutenant-Governor in Council may declare the schedule to be in force during pleasure, or for a period, not exceeding twelve months, stipulated in the schedule, within such zone or zones as may be prescribed, and to be binding on employers and employees in the industry.

On 19th November 1938 (Ex. 35) "Sol Spivak and L. Finkle Secretary Treasurer, Toronto Joint Board Amalgamated Clothing Workers of A.", describing themselves in the document as representatives of employees in the "Men's and Boys' Clothing Industry as defined for the Province of Ontario", petitioned the Minister, in writing, to call a conference for the purpose of investigating and considering the conditions of labour and practices prevailing in the industry, and for negotiating a schedule of wages and hours and days of labour pursuant to the Act. The evidence shows that the signers were officers of a trade union, with many members employed in the industry, and they were undoubtedly "representatives of employees" within the meaning of s. 6. Two days previously the Minister had defined the industry and designated the whole of the Province as a zone for the industry (Ex. 31). On the same day he had authorized (Ex. 30) Mr. Fine, an officer appointed under the authority of the Act, to convene a conference of the employers and employees. This direction to Mr. Fine preceded the petition, but Mr. Fine gave evidence that he later received instructions from the Minister to do nothing until the industry should have been dealt with by the Industry and Labour Board as an interprovincially competitive industry, and that he did not proceed until subsequently authorized. On 16th December following, the Board declared the industry, as defined by the Minister, an interprovincially competitive one, and Mr. Fine then received his instructions (Ex. 39) from the Minister to proceed.

On 6th January 1939, the conference was called for 16th January, by the insertion of an advertisement (Ex. 33) in three

Toronto papers, and by sending a notice to a large number of employers whose names were on a list in the Department of Labour (Ex. 34).

It is argued on behalf of the appellants that the conference described in s. 6 is a conference of "the" employers and employees, and that all employers and employees must be given notice. It is to be observed that the Act nowhere attempts to prescribe what notice is to be given, or how it is to be given. I do not think it can be said that there could be no conference under the Act if any employer or employee did not have the notice brought home to him. Mr. Slaght argues that there should have been greater publication than there in fact was, but in my view of the requirements of the Act, the question of notice is an administrative matter, to be dealt with by those whose duty it is to carry out the duties involved in the calling of a conference, and it is not open to the Court, on the evidence here, to say that the method of calling the conference was so deficient as to amount to there having been no conference at all. One safeguard at least is provided by s. 8, under which the Minister, before approving of any schedule, must be satisfied that it is agreed to by a sufficient number of employers and employees. Presumably he would only approve with full knowledge of the numbers engaged in the industry, as well as of those present at the sessions of the conference.

Mr. Slaght attacks the Minister's authorization of Mr. Fine (Ex. 30) on the ground that it does not state the purpose for which the conference is to be called. However, the later instructions (Ex. 39) refer to the petition (Ex. 35) which does state the purpose for which the calling of the conference is asked. Mr. Fine had, in addition, verbal instructions from the Minister, and there is nothing in s. 6 which requires the instructions to be in writing. That Mr. Fine fully understood his instructions is shown by reference to the published notice of the conference (Ex. 33), which is signed by the Minister, which fully sets forth the objects, and which is not complained of. The written notice (Ex. 8) sent to the employers appearing on the list in the Department of Labour (Ex. 34) is also attacked on the same ground. This notice, however, refers to the notice to be published in the three papers already mentioned. I do not think that these objections can be upheld.

On 16th January a number of persons assembled, but at the request of the solicitor for certain employers the conference was adjourned to the 19th. The request for adjournment had been made before the 16th, and the employers on the list (Ex. 34) were notified by letter of 12th January (Ex. 9) of the proposed adjournment.

On the 19th the conference resumed. It was attended by both employers and employees, including representatives of both classes, the employees' representatives being officers of trade unions.

Mr. Slaght argues that s. 6 does not authorize representatives of employees to be present at a conference, but that employees themselves alone have any standing there. The conference which was convened recognized representatives of both employers and employees, and, in my opinion, did so properly. This contention is completely answered by a reference to s. 4(2).

On the 19th the persons present identified themselves, and a record was made of this. It was suggested at this conference that it would be impossible for the large group to function efficiently, and that a committee should be formed to attempt to formulate a schedule. As a result, a committee was set up by the appointment of certain persons to represent those present. This was done informally, but without objection, and it is clear, I think, on the evidence, that all persons present considered themselves represented by some member of this committee. It was also arranged in open meeting that when the committee had finished its work, the conference would be reconvened by the members of the committee notifying those whom they represented.

This committee met on a number of occasions, the last occasion being 7th February, 1939. It was then arranged that notice should be given, as had been arranged on 19th January, that the conference would meet the following day for the purpose of dealing with a schedule which embodied the work of the committee, although it did not have the approval of all the members. The conference accordingly re-assembled on the 8th. I think that as the conference on 19th January had agreed to this procedure, the contention of Mr. Slaght that the conference did not in fact re-assemble on 8th February cannot be upheld. The meeting of 19th January was composed of employers and employees and representatives of both, and once it

is held that that meeting was properly convened, as it appears to me it was, all objection to the method of procedure then followed disappears, as that method was arranged, without objection, by the meeting itself. It is not without significance that the resolution expressing appreciation to the Minister for his interest in the conference, which was passed on 8th February, expressly by the "conference", was seconded by the solicitor who throughout had acted for the Association of which the plaintiffs, other than the Cornwall Pants Co., were members, in the presence of the representatives of these plaintiffs. At that time there was no suggestion by anyone that the conference had not been properly brought together. It should also be mentioned that the plaintiff, Cornwall Pants Co. was represented at the meeting of the committee on 7th February, and that its proprietors knew that the conference was to re-assemble on the following day.

A question is also raised as to the authority of Messrs. Cohen, Spivak and Duncan to represent employees for any of the purposes of the conference, but the evidence establishes that the local unions approved of steps being taken by the organization of which Messrs. Duncan and Spivak were members, to initiate under the Act the calling of this conference, and that these local unions expressly authorized Messrs. Cohen, Duncan and Spivak to represent them there. I refer to Exhibits 46 and 47 and Mr. Frecktel's evidence. At the meeting of 19th January some thirty-five individual employees from these particular local unions were present (Ex. 48). Other employees were also present on that day and arranged for their separate representation on the committee. In my opinion all these employees' representatives were properly and sufficiently authorized, and I am unable to uphold any objection to the conference on that ground or on the ground that there were other employees in the industry who did not attend, or that the notice for the conference did not reach their attention. If the manner of giving notice was sufficient, as I think it was, the fact that the notice did not come to the attention of all employees, any more than of all employers, does not enable the Court to say there was no conference in fact, as contemplated by the Act.

On 8th February the schedule was read, and, following some discussion, those who desired to sign it were requested by Mr. Fine to do so. This schedule (Ex. 36) is produced. It is signed

by representatives of some forty employers. The only employees' representatives who signed were Messrs. Duncan and Spivak. Mrs. Finch, who had represented another union throughout the proceedings, although present, did not sign.

This schedule, together with a written report by Mr. Fine setting out the history of the conference, was then forwarded to the Minister, who subsequently approved of it. This was followed by the order-in-council, passed on the Minister's recommendation, bringing it into force. This order recites that the Minister is of opinion that the schedule had been agreed to by a proper and sufficient representation of the employers and employees engaged in the industry.

In considering the validity of these proceedings, it is to be observed that s. 7 does not lay down any procedure by which the schedule there referred to is to become the schedule of the conference, or as to how the schedule is to be "submitted" to the Minister. Obviously, it would be very difficult to put any schedule to a vote of the conference. If employers, for instance, had each one vote, a few employers, with small establishments and few employees, would outvote one employing many more employees than they. By s. 8 the Legislature has left it to the opinion of the Minister to say whether or not the schedule has sufficient support in the industry to approve it and recommend that it become law. Where the Minister approves, and there is no suggestion, as there is none here, of lack of *bona fides*, there is no room for the Court to interfere. The question throughout is one of construction of the statute: *Local Government Board v. Arlidge*, [1915] A.C. 120 at 130. The statutory requirements set forth in ss. 6 and 7, no doubt, constitute conditions precedent, upon the observance of which the validity of any schedule depends. If they are observed, it is for the Minister to say whether or not, in his opinion, a sufficient representation of employers and employees have agreed, and in so deciding the Minister may inform himself as he sees fit. Whether the functions of the Minister under the section are to be described as purely administrative, or as *quasi-judicial*, need not be determined. In either view the result is the same. In my opinion the earlier proceedings under ss. 6 and 7 were properly carried out, and there are not materials before the Court upon which the decision of the Minister, or, in fact, that of the Lieutenant-Governor in Council, upon the principles laid down in *Board of*

Education v. Rice et al., [1911] A.C. 179; *Errington et al. v. Minister of Health*, [1935] 1 K.B. 249; *Hutton v. Attorney-General*, [1927] 1 Ch. 427; and *Rex v. Noxzema Chemical Company of Canada, Limited*, [1942] S.C.R. 178, [1942] 2 D.L.R. 51, could be challenged, even if open to review. It follows that the schedule was a valid schedule.

It is, however, argued, on the authority of the decision of McEvoy J. in *Rex v. Belyea Bros. Ltd.*, [1937] O.W.N. 231, that the schedule and order-in-council declaring it to be in force, are invalid. In the *Belyea* case the learned judge held that the schedule there under consideration went beyond what was authorized, because he was of opinion that it extended to persons not employed by employers engaged in the industry. The question in each case is one of construction of the particular schedule. In the case at bar, the schedule, in my opinion, deals only with employees and employers in the industry defined by the Minister by Ex. 31. The industry is there defined by reference to the character of work performed. This, in my opinion, is a valid definition, and it is to the employers and employees alone in this kind of business that the schedule applies.

I would therefore direct that the appeal be dismissed with costs. In the circumstances it is not necessary to consider the question as to whether or not the defendant Advisory Committee was properly made a party.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: German and Howard, Toronto.

Solicitor for the Advisory Committee, respondent: J. L. Cohen, Toronto.

Solicitor for the Attorney-General for Ontario, respondent: C. R. Magone, Toronto.

[COURT OF APPEAL.]

Attorney-General of Canada v. C. C. Fields & Company.

Revenue—Share Transfer Tax—Collection and Accounting by Broker—Duties of Brokers—Affixing and Cancellation of Stamps—Burden of Proof—The Special War Revenue Act, R.S.C. 1927, c. 179, ss. 58(2), 60, 62, 63(2), 101, 108, as amended, and Regulations thereunder.

The tax imposed by s. 58 of The Special War Revenue Act, R.S.C. 1927, c. 179, is, under s. 60, payable by the vendor, transferor or assignor. S. 60 authorizes the making of regulations prescribing the manner in which, and the persons by whom, the amount of such tax shall be computed and collected for and on behalf of His Majesty, but the regulations made under the section cannot impose liability for payment of the tax upon the stockbroker through whom a sale is effected and upon whom the regulations impose the duty of collecting the appropriate tax. For breach of the regulations, e.g., as to affixing and cancelling stamps, s. 63(2) of the Act provides a penalty, but nowhere, either in the statute or in the regulations, is there a provision that failure to observe the regulations as to the manner of accounting shall render a collector liable for anything other than a penalty.

A stockbroker who, as required by the regulations, collects from his customer the amount of the tax payable on the sale of an unlisted security is, independently of the regulations, liable directly to the Crown for the amount so received, and must account to the Crown therefor.

Where the Attorney-General of Canada sues to recover from a firm of stockbrokers the amount admitted to have been received by them, over a period of time, from their customers, as the tax payable under the statute on sales of unlisted securities, the burden is on the defendants to establish payment to the Crown, either in money or in excise stamps, of the amount received. The question of payment is one of fact, to be determined upon the evidence. In the present case, *held*, Laidlaw J.A. dissenting, payment in excise stamps had been established, and the action should be dismissed, notwithstanding that the defendants had not complied with the regulations as to the manner of affixing and cancelling the stamps, and that the cancelled stamps themselves were not available when demanded for inspection and audit.

Per Laidlaw J.A., dissenting in part: The defendants were trustees for the Crown, and should be required to account strictly as trustees for the disposal of the excise stamps purchased. The evidence here was insufficient, and had not been directed with any particularity to the questions and facts upon which judgment should be based. There should therefore be a new trial.

AN appeal by the defendants from the judgment of Hope J., [1943] O.R. 120, [1943] 1 D.L.R. 434, [1943] C.T.C. 32. The facts are fully stated in the judgments.

21st, 25th and 26th May 1943. The appeal was heard by ROBERTSON C.J.O. and HENDERSON, GILLANDERS, KELLOCK and LAIDLAW JJ.A.

Hon. J. Earl Lawson, K.C. (J. J. Burke with him), for the defendants, appellants: S. 58(2) of The Special War Revenue Act, R.S.C. 1927, c. 179, as amended, provides by whom the tax shall be payable, and the power to make regulations is limited

to what is stated in s. 60. There is no provision as to who must purchase stamps, or how they may be procured—but see ss. 102 and 103. Under Reg. 2 of 1932, the broker was required to *pay* the tax to the Crown, by affixing stamps. Reg. 2 of 1937 says that the broker shall compute the tax and *account* therefor in the prescribed way. Note also the difference resulting from the elimination, in 1937, of the reference to “the” duplicate memorandum. The 1932 provision, in this respect, was impracticable, because of the very small amount of tax payable on some transactions.

As a matter of practice, the broker charges the vendor the amount of the tax, and buys the necessary stamps. In so doing, he is the agent of the vendor, and he does not become the agent of the Crown until the stamps come into his hands. [ROBERTSON C.J.O.: When the broker receives money from his customer, to buy stamps, may it not be that he then and there holds it on behalf of the Crown?] Yes, under the obligation to go and buy stamps. The trial judge has found as a fact that we did buy stamps to the total amount now claimed.

The Crown’s claim is three-fold: (1) for a debt due to the Crown, under s. 108 of the Act; (2) for damages for negligence in not cancelling and retaining the stamps; and (3) for an order in the nature of a prerogative *mandamus* requiring us now to affix and cancel stamps. As to the interpretation of taxing statutes, *The King v. Crabbs*, [1934] S.C.R. 523 at 525-6, [1934] 4 D.L.R. 324, collects all the leading cases. See also *Attorney-General for Ontario v. National Trust Co. Ltd.*, [1931] O.R. 122 at 126, [1931] 2 D.L.R. 712. The trial judge has improperly considered the “spirit” of the Act and regulations.

Dealing with the Crown’s claims *seriatim*:

(1) S. 108 was considered in the *Crabbs* case, *supra*. The rest of the Act was then different, and did not in terms impose a tax. S. 108 creates a debt only where the tax is definitely imposed on the person from whom payment is sought. S. 60 of the Act, in its present form, does impose a tax, but on the vendor and not on the broker, and the *Crabbs* case is therefore still applicable to the broker: *The King v. Walker and King Ltd.*, 61 D.L.R. 283 at 285, [1921] 3 W.W.R. 191. The only obligation imposed on the broker by the Act is to compute and collect the tax. [ROBERTSON C.J.O.: In the *Walker and King* case the defendant never collected any money for the Crown.] The

principle is the same, because we collected the money from our customers only as agent for them. We are constituted the collector, not of money, but of stamps. The words "all taxes and sums payable under this Act" in s. 108 must refer to money.

Though the statute provides that the tax must be paid by the vendor, the regulations require payment by the broker. The recitals in the Order in Council of 6th August 1930 show a complete misconception of the powers of the Governor in Council. In so far as the regulations impose on a broker a liability which might be recoverable under s. 108, they are clearly *ultra vires*: *Malkin v. The Minister of National Revenue*, [1938] Ex. C.R. 225 at 233, [1939] 1 D.L.R. 200; *The King v. Noxzema Chemical Company of Canada, Limited*, [1942] S.C.R. 178, [1942] 2 D.L.R. 51, is distinguishable; what was being dealt with there was not the kind of obligation created by s. 108; the question was whether there was any debt at all.

Regs. 2 and 12 are also *ultra vires* on another ground. The statute authorizes provisions as to computation and collection of the tax. The function of collecting is complete when the things to be collected, *i.e.*, stamps, are assembled together. All the provisions as to affixing, cancelling and retaining the stamps are as to matters subsequent in point of time to the act of collecting, and hence are not authorized. [ROBERTSON C.J.O.: Does not the process of collecting continue until the stamps have been appropriated by attaching, cancellation, etc.?] No, only up to their appropriation to the proper transaction.

As to the legal relationship between the parties, the trial judge has found that we were trustees, with the resulting implication that we must account for moneys had and received on behalf of the Crown. But we never had or received any moneys on behalf of the Crown. All we received on behalf of the Crown was stamps, and therefore, even if there was a trusteeship, it could extend only to the stamps.

In any case, the statute itself provides the remedy, by the penalty section, s. 63(2). If there is a trusteeship, it can only be one created by the statute: 1 Halsbury, 2nd ed., p. 11; *The Wolverhampton New Waterworks Company v. Hawkesford* (1859), 6 C.B. (n.s.) 336 at 356, 141 E.R. 486; *Pasmore et al. v. The Oswaldtwistle Urban District Council*, [1898] A.C. 387 at 394; *The Great Northern Steamship Fishing Company v. Edgehill* (1883), 11 Q.B.D. 225.

(2) Any damages or loss suffered by the Crown because of our inability to produce the stamps can be dealt with only in a substantive action based upon a legal ground—it is not a mere matter of accounting: *Great Western Insurance Company v. Cunliffe* (1874), L.R. 9 Ch. 525, 43 L.J. Ch. 741. The substantive claim here is the second one, for damages for negligence. If the regulations are *intra vires*, then we undoubtedly failed to comply with them, but this does not *ipso facto* constitute negligence: *Goodwin v. Goodwin and The Canadian Pacific Railway*, [1933] O.R. 225, [1933] 1 D.L.R. 753, 40 C.R.C. 316; *Walsh v. International Bridge and Terminal Co.* (1918), 44 O.L.R. 117, 45 D.L.R. 701.

In any case, there can be no liability in damages unless there has been a loss, and there is no evidence here of any loss. The Crown might have given evidence establishing a reasonable probability of loss, but has not done so. The opportunity for using these stamps a second time is very limited, both because they are used by so limited a class of people, and because of the very large denominations in which, according to the evidence, the defendants bought them. The method of affixing and cancellation used by us was as effective to prevent removal and second use as that prescribed in the regulations. We have satisfied any onus that might be on us to show that we in fact paid the money to the Crown.

Further, the Crown is estopped, because (1) we were audited in 1934, and no objection was made to our system of cancellation; (2) there was a general system, well known to the Crown, throughout the trade; (3) the Crown itself, in connection with a transaction with us, cancelled stamps with a rubber stamp. Although there cannot be estoppel by deed against the Crown, there can be estoppel *in pais*: *Attorney General to The Prince of Wales v. Collom*, [1916] 2 K.B. 193 at 204; *The King v. The Canadian Pacific Railway Company*, [1930] Ex. C.R. 26 at 37, [1929] 2 D.L.R. 641, 35 C.R.C. 248; *Peterson v. The Queen* (1889), 2 Ex. C.R. 67.

(3) As to the claim for a mandatory order. [ROBERTSON C.J.O.: No such order was in fact made here. We do not need to hear you on that.]

J. C. McRuer, K.C. (*A. J. P. Cameron*, with him), for the plaintiff, respondent: S. 58(2) imposes the tax on a change of ownership, and s. 60 provides for payment in stamps. The per-

son who buys a stamp is not then paying the tax; he is merely procuring the necessary currency. As to the legal relationship, see Robertson's Civil Proceedings, p. 144; *Rex v. Wrangham* (1831), 1 Cr. & J. 408, 148 E.R. 1481; *Rex v. Ward* (1836), 2 Ex. 301, 154 E.R. 507; *Reg. v. Adams and Warren* (1848), 2 Ex. 299, 154 E.R. 506.

When and how does the broker become discharged of his debt to the Crown? [HENDERSON J.A.: Do you contend that Reg. 2 makes the broker liable for the tax?] Yes, if he has money on hand with which to pay it. The regulations provide means of discharging the liability which exists under the general law. If they are not complied with, the broker has received the money, but not discharged his debt. [ROBERTSON C.J.O.: If the evidence clearly indicated the purchase of stamps, and appropriation to particular transactions, could the Crown then demand payment again, simply because of improper cancellation?] That is not the evidence here.

The broker is liable to account for, and deal with, the money, not only as a debtor, under the authorities quoted above, but also as a trustee. The defendants have not complied with the regulations as to the manner of doing this. There is no evidence as to what was done with the stamps before 1937, except that there was a system, which the employees should have carried out. The onus is on the defendants to show that the stamps were properly cancelled. When they failed to comply with the regulations, they assumed the risk of being unable to show a proper disposition of the stamps.

As to estoppel, it is not established by the evidence that the method in force before 1934 was brought to the attention of the auditors at that time. Even if our auditors were negligent, and did not object to the system, that would not estop the Crown: *The Queen v. The Bank of Nova Scotia et al.* (1885), 11 S.C.R. 1; *The Bank of Montreal v. The Queen et al.* (1906), 38 S.C.R. 258.

As to the construction of the statute, see *Attorney General v. Carlton Bank*, [1899] 2 Q.B. 158 at 164.

We claimed a declaration that we were entitled to a *mandamus*. This was an alternative claim only. See 9 Halsbury, 2nd ed., p. 751. It is arguable that the proper remedy is a prerogative writ, which cannot be claimed in an action. But we have asked only for a declaration. The same relief was granted in *Eastview Public School Board v. Township of Gloucester*

(1917), 41 O.L.R. 327 at 343, 40 D.L.R. 707. [ROBERTSON C.J.O.: This Court has no power to grant a writ of *mandamus*, and would not make such a declaration.]

Hon. J. Earl Lawson, K.C., in reply.

Cur. adv. vult.

15th July 1943. ROBERTSON C.J.O.:—This is an appeal from the judgment of Hope J., dated 13th January 1943, after the trial of the action before him, without a jury, at Toronto. By the judgment the respondent was awarded the sum of \$51,487.43 and costs, that sum being the amount collected by appellants, as brokers, from their customers, in the years 1934-1940, for the tax payable by the vendors under The Special War Revenue Act, R.S.C. 1927, c. 179, as amended, upon the sale of shares and bonds made otherwise than on a stock exchange. There is included, however, in the sum awarded, an amount representing the tax on similar sales made by appellants as themselves the vendors.

There is no dispute about the amount received on this account by appellants from their customers, or as to the amount of tax that became payable by appellants themselves as vendors. The information on which respondent's claim is based in this respect is all taken from appellants' own books of account. As the facts disclosed in evidence, and the several contentions made by the parties, are discussed at length in the judgment of the learned trial judge, I shall refer only to such of them as I shall require specifically to deal with.

An excise tax, at rates set forth in the statute, is imposed by s. 58(2) of The Special War Revenue Act, upon every change of ownership consequent upon the sale, transfer or assignment of any bond or of any share.

S. 60 provides that the tax shall be payable in excise stamps, by the vendor, transferor or assignor, and that "the Governor in Council may make regulations prescribing in any case or class of cases the manner in which and the persons by whom the amount of such tax shall be computed and collected for and on behalf of His Majesty".

Regulations were made that came into effect on 26th May 1932 and remained in effect until they were superseded by new regulations that came into effect on 1st June 1937, and these latter continued in effect throughout the balance of the period

in question here. The regulations have, at all times, made a distinction between sales executed on a stock exchange and sales not executed on a stock exchange. It is the latter only that this case is concerned with. By the regulations in effect from 26th May 1932, the tax on the transaction was to be paid to the Crown by the vendor stockbroker affixing excise stamps of the requisite value, to the duplicate of the memorandum of sale retained on file in his office. The stockbroker was required (a) to prepare a memorandum in duplicate of the sale; (b) to deliver the original of such memorandum of sale to the purchaser, and (c) to retain the duplicate of such memorandum of sale on file in his office until such time as official permission was given for its destruction. These regulations further required that the stockbroker upon whom was imposed the duty of affixing excise tax stamps in accordance with the provisions of the Act and the regulations, should cancel the said stamps by means of a perforator.

The regulations effective from 1st June 1937 were somewhat differently expressed. They provide that every stockbroker who effects the sale of any bond or share shall compute the tax payable and account therefor, if the sale is effected otherwise than on a stock exchange, as follows: "pay the tax forthwith by affixing excise stamps of the requisite value to a memorandum of the sale to be kept in his office". The requirements of these later regulations as to preparation of a memorandum of sale in duplicate, and as to retaining the duplicate copy, and as to affixing securely thereto the stamps, and as to the cancellation of the stamps by perforation, are the same as in the earlier regulations.

I have set forth these provisions of the regulations in some detail, as argument was addressed on the appeal, attacking their validity. It was contended that in each case the regulations went beyond what was authorized by the Act, in that they purported to require the stockbroker to pay the tax. I think it is possible so to construe the regulations that their provisions will fall within the terms of s. 60 of the Act as "prescribing . . . the manner in which and the persons by whom the amount of such tax shall be computed and collected for and on behalf of His Majesty". If, and in so far as they exceed the statutory authority for making them, they are invalid and un-

enforceable. But, in my opinion, the question of appellants' liability does not turn primarily upon the regulations.

Before proceeding to discuss the Act and the regulations, it is well to note that payment of the tax, by affixing stamps to the duplicate memorandum of sale, is not made an essential to the validity of the transaction of sale. The purchaser's title is not affected in the least by non-payment of the tax, or non-observance of the regulations. In that respect the tax differs from cases where the instrument to be stamped is itself the subject-matter of taxation, and is unenforceable or inadmissible in evidence unless duly stamped, such as in the case of certain stamp taxes provided for by the Imperial statute, 1891, c. 39. The tax imposed by s. 58(2) is a tax of so many cents per share, or on the par value of a bond. Stamps are merely the medium of payment of the tax. The judgment recovered in this action is for the payment of money, as the tax.

The tax now in question is, by s. 60 of the Act, the personal liability of the vendor. Its collection only is made the duty of the stockbroker, and it is made so only by the regulations. The several requirements of the regulations, as to a duplicate memorandum of sale to which the requisite stamps are to be affixed, the cancellation of the stamps by perforation, and the retaining of the stamped duplicate memorandum, are designed for the protection of the revenue.

As I have already stated, the accuracy of appellants' records of sales, and their computation of the tax payable on the sales and the record of the amount thereof, are not questioned. There had been a question whether tax was properly payable on certain transactions, but on a ruling that the tax was payable, it was promptly paid, and no doubt has been suggested of appellants' good faith in that connection. While it is not admitted, the trial judge has found that appellants duly purchased stamps in the aggregate value of the amount claimed to be owing, and, in my opinion, the evidence amply supports that finding. No other could reasonably be made on the evidence. The learned trial judge finds, however, that appellants did not comply with the regulations in that they did not affix the stamps to duplicate memoranda of the sales; neither did they cancel the stamps by perforation. Instead of doing as the regulations required, appellants say their practice was to affix, usually every month, the requisite total value of stamps for the sales during the

period, to a sheet of letter paper bearing the firm's letterhead, and to note on the sheet the value of the stamps affixed and that the stamps affixed were the stamps for the sale of unlisted bonds and shares in that period, the dates of which were given. The stamps were then cancelled by the clerk writing his initials with pen and ink on each stamp, or, in a later period, by a rubber stamp which made lines across the face of each stamp. Respondent does not make any admission that appellants did even what they say they did, but as I shall later have to discuss the evidence on the matter in some detail, I proceed, without further present reference to it, to define the position taken by respondent, and, as I understand his reasons for judgment, approved by the learned trial judge.

The rule is well established that one into whose hands money of the Crown comes, is a debtor therefor to the Crown: *Reg. v. Adams and Warren* (1848), 2 Ex. 299, 154 E.R. 506; *Rex v. Ward* (1836), 2 Ex. 301, 154 E.R. 507; *Rex v. Wrangham* (1831), 1 Cr. & J. 408, 148 E.R. 1481; *In re West London Commercial Bank* (1888), 38 Ch. D. 364. It is not necessary that the Crown should wait for the money to be turned into excise stamps. It has an option to claim what the collector has received: *Reg. v. Adams and Warren, supra*. As it is not in dispute that appellants received from their customers the amount claimed as and for the tax payable by them to the Crown, appellants became debtors to the Crown for that amount. Starting from here, respondent's counsel stated his position concisely in opening the case at the trial: "The Crown contends that the only way in which the debt can be paid is either paying the money to the Crown or affixing the stamps to the documents according to law". Then, after briefly stating what appellants claimed they had done, counsel proceeded: "The point in the whole case is—we say that is not a defence to our action in any case, even if you did do that, because that is not payment of the debt in the manner prescribed by law". The trial judge appears to have acceded to this view, for he says in his reasons for judgment: "The present defendants are only called upon to account for revenue collected for and on behalf of the Crown, and failure to account for collection in the manner prescribed, in my opinion, renders the defendants liable for the amount in question".

According to the view so put forward and adopted, it would be no answer for appellants to prove that the Crown had in

fact suffered no loss of revenue. The manner of accounting is made the thing of substance, rather than the fact of payment. No one questions that the Crown was entitled to whatever amount appellants received from their customers for the excise tax on the sale of securities otherwise than on a stock exchange, but I cannot think that if appellants have shown, by admissible evidence, that the Crown has had from them all sums so received, they are liable to pay over again because the manner of payment was not that prescribed in the regulations. In my opinion that is not the meaning or the effect of the statute and regulations.

So far as the statute itself is concerned, the person liable to pay the tax is the vendor, transferor or assignor. S. 108 provides for the recovery by action of "All taxes or sums payable under this Act", and no doubt applies to the case of a vendor, transferor or assignor who does not pay. The stockbroker is not burdened with either duties or liability by the statute itself. The regulations make him the collector of the tax, and assign him duties and obligations as such. The Act also, in s. 62, provides that every collector of the tax shall keep records and books of account. S. 63(2) is as follows:

"Any person who, being thereto liable, neglects or refuses to pay the tax imposed by this Part, or who violates any of the provisions of this Part for which no other penalty is provided, or of any regulations made thereunder, shall be liable upon summary conviction to a penalty not exceeding five hundred dollars".

Whatever the regulations themselves may say, they cannot validly do more than prescribe "the manner in which and the persons by whom the amount of such tax shall be computed and collected for and on behalf of His Majesty". For breach of the regulations, s. 63(2) provides a penalty. Nowhere, in either the statute or the regulations, is there a provision that failure to observe the regulations as to the manner of accounting shall render a collector liable for anything other than a penalty.

Appellants, like many other persons, have had imposed upon them burdensome duties in connection with the collection of taxes payable by some one else. These duties they can discharge only at considerable trouble to themselves, and by employing the necessary office help. The service they render is entirely gratuitous, for they receive not even a licence to carry on their business from the Government they serve. It is a matter of

serious concern if appellants, and others from whom similar requirements are made, incur liability, not only to penalties, but to payment of the taxes of which they are, without their consent, made the collectors, for failure merely to observe the regulations as to the manner in which their duties are to be performed, without evidence of any loss of income thereby. That is the effect of the judgment in appeal, for it is not based upon evidence of any loss of revenue. On the contrary it is not, I think, open to reasonable doubt upon the evidence that the Crown has had from appellants in large measure, even if not wholly, the taxes for payment of which this action was brought. That matter, and the evidence upon it, I shall discuss later. For the moment, what I desire to make plain is that the basis of the present judgment is not the proof of some loss of revenue to the Crown through appellants' default or neglect, but their failure to proceed in the manner that the regulations prescribe. In my opinion, nothing short of a specific statutory provision could create that liability: *The King v. Crabbs*, [1934] S.C.R. 523, [1934] 4 D.L.R. 324, and I refer also to the discussion, in the judgments in *Worthington v. Attorney-General of Manitoba*; *Forbes v. Attorney-General of Manitoba*, [1936] S.C.R. 40, [1936] 1 D.L.R. 465, of the statute in question there.

Putting aside consideration of any possible liability of appellants for loss of revenue arising from their default or negligence in respect of their duties under the regulations, because there is no evidence of any such loss, and no attempt was made to establish a case of that kind, the true basis of any claim respondent may have lies, in my opinion, in the admitted receipt by appellants from their customers of the amount claimed as taxes due to the Crown, and in their obligation to pay that amount, either by money or by stamps purchased and cancelled, and thereby discharge their debt to the Crown. The burden of proving payment is plainly upon the appellants. Whether, upon the evidence, it should be found that they have discharged that burden is a question of some difficulty, and it becomes necessary to discuss the evidence.

An important circumstance to be mentioned at the outset is that the file of cancelled stamps that appellants claim to have had is missing. A Government auditor made an inspection in 1934 and saw appellants' method of dealing with the excise stamps appropriated by them to the payment of the tax on

the sale of unlisted securities, and is said to have made no criticism of it. Not until six years later, on 8th July 1940, did a Government auditor come again to make a check of the collection of the tax by appellants. When he asked for production of the cancelled stamps the file containing them was not in its place and could not be found, nor has it yet been found. Important as this circumstance is, a court may find, upon proper and sufficient evidence, that a stamp tax has been paid although no cancelled stamp is to be found: *Doe d. Fryer v. Coombs* (1842), 3 Q.B. 687, 114 E.R. 670. If appellants can, by evidence, satisfy the Court that the Crown has had its revenue, I see no reason why they should have to pay a second time.

Appellants contend, in the first place, that as they purchased excise stamps to the amount of the taxes received from their customers, the Crown thereby had its money. I do not think that is a sufficient answer. Doubtless, they bought the stamps, but the stamps were purchased with money out of appellants' general bank account and were available for more uses than one. The stamps bought with yesterday's taxes might be used for to-morrow's sales. Excise stamps are not currency, nor are they in as common use as postage stamps, but until they are cancelled they are worth their face value for the payment of any excise tax payable in stamps. It is necessary for appellants to carry the evidence further than the mere purchase of the stamps, and to show their appropriation to the payment of these taxes.

There is a substantial body of evidence that I think credible that there existed in appellants' business a definite routine, or practice, with respect to the purchase of excise stamps for the specific purpose of paying the tax on the sale of unlisted securities, and the application of the excise stamps so purchased to the specific purpose for which they were bought, and their cancellation. The routine, or practice, prescribed by appellants for their staff was, in general, that which had been in use by their predecessors, Huston & Company, whose business appellants took over in 1932. Some alterations in the details of the system were made later, but they were not of fundamental importance. At no time were the regulations strictly complied with throughout the process of affixing and cancelling the stamps, and for respondents it is contended that the evidence does not establish that even the irregular routine or practice that appel-

lants expected their employees to follow was in fact observed by them.

Appellants had a large business. In busy times they employed, in their Toronto offices, more than 400 hands, and the transactions in shares and securities amounted to as many as 4,000 in one day. Witnesses were called who had held the position of office manager within the period in question, and among them they covered the whole of the period from 1934 to 1940. They gave evidence of the office practice in relation to the purchase of excise stamps for the tax on sales of unlisted securities, and described how the stamps were then dealt with. Their evidence is consistent, the one with the other, except in regard to small details such as the date when a rubber stamp came to be used for cancellation of stamps, instead of doing it with pen and ink. In effect, the evidence of these men is corroborative the one of the others. Men occupying junior positions in the office, who had occasion to observe how the stamps were dealt with at different times in the period in question, were also called, and added corroborative evidence as to the system followed. The result of this considerable body of evidence is, in my opinion, to place it beyond reasonable question that, so far as the partners and managers engaged in the active direction of the business as its heads were concerned, they had established a system that, if carried out as they intended it to be and believed that it was, would result in the Crown receiving in full, by way of stamps purchased and cancelled, whatever sums appellants collected from their customers on this account. The regulations were not observed throughout, it is true, but the result would be the same, so far as the revenue of the Crown was concerned. The evidence fully establishes that there was a real intention on the part of appellants and the men in general charge of the business, that these excise taxes should be paid, and there is not a tittle of evidence that the firm benefited to the amount of one dollar through any default, if any default occurred.

There is the further evidence by a number of the same witnesses that from time to time they saw the clerks who had the duty of affixing the excise stamps and cancelling them, actually engaged in that work. From some of the same body of witnesses there is evidence of having, at one time or another, had in their hands the file of sheets to which the stamps were affixed, and

of having seen that it contained sheets with cancelled stamps, and their evidence is that the file was of some thickness and increased in bulk as time went on. One of these witnesses estimated that when he last saw the file it contained about 50 of these sheets. Several witnesses saw the file within a few weeks of the visit of the Government auditor on 8th July 1940, and it appeared to be in its usual condition, and two of the clerks, each speaking of a different occasion, said that they had, in the year 1940, added new sheets to the file, with cancelled stamps affixed, the last of these occasions being in June.

There was commonly but one clerk whose duty it was, at any given time, to obtain the excise stamps from the cashier and affix and cancel them. It was not the same clerk throughout the period from 1934 to 1940, and at times, the clerk whose duty it was being absent on holiday or laid off in a slack time, another clerk would replace him. One Legere was assigned this duty from early in 1937 until the end of the period we are concerned with here, except for two months early in 1940, when Legere was laid off, and one McLennan was assigned this duty. McLennan had been with appellants since February 1933, and while it was not his duty to affix and cancel the stamps except in two months of 1940, he had some supervision of it. He says that it was more or less his responsibility, although the actual operations were done by others. He was there at the time of the auditor's visit in 1934, and he says that the practice then was to affix the stamps to a letterhead, as it continued to be throughout. According to his observation, the stamps were affixed and cancelled by the employee whose duty it was, from time to time. He says further that in the two months in 1940 when it was his personal duty, he affixed the proper stamps in the usual way and cancelled them with pen and ink, the rubber stamp that had been in use being temporarily mislaid.

No witness was called whose duty it had been personally to affix and cancel the stamps in the period prior to 1937, when Legere first took it over. A man named Ballantyne is mentioned as having been on that duty at an earlier time, but he was, apparently, not available as a witness. McLennan tells of Ballantyne's method, which was the same as others. It should be mentioned, as a matter of detail, that the evidence is not always precise, nor are all the descriptions the same as to the manner of cancellation from time to time. At times, when pen

and ink were used, each stamp was cancelled by lines drawn across it. At other times the operator wrote his initials across the face of the stamp. In the later period a rubber stamp that made lines across the stamp was in use, but, as was perhaps to be expected, the accounts given by the several witnesses do not always agree as to the particular method in use at some particular time. A good deal of time was spent on cross-examination over this sort of thing, and we heard a good deal about it in argument, but I am unable to see that it has any special significance. One method was probably about as good as another for effective cancellation, and the ordinary person would not charge his memory with the details of it. That witnesses should differ in a matter of this kind does not, in my opinion, affect their credibility.

Legere is an important witness. He is a young married man, and, unfortunately, he has what is called "a record". In 1932, when working for another firm, he was charged with and convicted of theft and served a term of four months' imprisonment. After that he was employed in the stock-room of the University of Toronto, before coming to appellants. At the time of the trial he was in the employ of Research Enterprise. He entered appellants' employ in May 1936, and, except for two short periods of one month and two months respectively, he was steadily in their employ until after the 8th July 1940. It is fair to say that appellants knew nothing of his misstep in 1932, and that Legere says that he has been trying to live it down ever since.

Legere was not assigned the duty of affixing and cancelling stamps until early in 1937. Substantially, he is in agreement with other witnesses as to the system followed. At first he cancelled the stamps by initialling each stamp, and he says that when he began there were other sheets in the folder bearing stamps similarly cancelled. Somewhat later there came into his hands a copy of the regulations, and he saw that they required cancellation of the stamps by perforation. He directed the attention of the office manager to this, and efforts were made to obtain a proper machine or instrument through dealers in office supplies, but without success. A Government department laid in a supply of several hundreds, but in the main it still has them. Legere says that it was at his suggestion that appellants

then got a rubber stamp, which made straight lines across and up and down the stamps, by way of cancellation.

Legere is not wholly in agreement with some other witnesses as to what was done for the safe-keeping of the file of cancelled stamps. All the witnesses agree that the file was regularly kept in a steel filing-cabinet in the manager's office. It is said that in earlier days—the date not being fixed—the file had been kept in an unlocked drawer. In the same cabinet were kept confidential papers relating to affairs of the firm, and some others. There is some difference as to the extent to which the cabinet was kept locked, and as to who placed the new sheets on the file. Other witnesses than Legere say that the cabinet was always locked, except when opened by, or in the presence of, the manager or his secretary, who alone had keys for it. Coleman, who was manager for a term, says that the practice was to bring the new sheet to him, and that it was he who put it on the file. Legere says, on the other hand, that during office hours the cabinet was not kept locked except when the office was empty. It was his custom to put the fresh sheet, with newly cancelled stamps, on the file in the cabinet, if he found the cabinet not locked. On some occasions, but very seldom, when the cabinet was locked and the secretary was busy, he had left the sheet on her desk. Legere last saw the file around the end of June 1940.

In addition to describing the duties he performed, Legere denies that he, at any time, removed from the file any of the cancelled stamps. He further denies that he, at any time, removed stamps from appellants' office, whether cancelled or otherwise. A similar denial, each for himself, is made by other witnesses, such as Campbell and Coleman, who had been, in succession, managers for most of the period in question, and Wright, who was accountant. Coleman says that the file was intact in the first part of May 1940, when he last saw the file.

There is no evidence that any of the appellants, or anyone in their service, was aware that the file was not still in its proper place when the auditor asked for it on 8th July 1940. There is no evidence that anyone connected with appellants had any knowledge in advance that the auditor was coming when he did, nor is any reason suggested why anyone in appellants' business should have expected a visit from a Government auditor, on that day any more than on any other day in the preceding

six years. The only explanation suggested in evidence by any witness for the file not being found in its proper place, when the auditor asked for it, is that at that time appellants were closing down part of their office, and were getting rid of some furniture and filing away old records, and it is suggested that, in the process, the file of stamps, by inadvertence, was put in some place where it should not be. A diligent search and enquiries throughout the staff failed to discover it.

Respondent's counsel laid stress upon a letter written on 29th July 1940 by Mr. Murray, then appellants' manager, to the Commissioner of Excise, with respect to the lost file. In the letter, after referring to their ineffectual search for the file, Mr. Murray said "We feel now justifiably that they have been either maliciously removed, or taken with intent to resell", and he proceeded to ask that "an R.C.M.P. investigator" look into the matter. Counsel pressed this letter as having a direct bearing upon the fact of cancellation, and suggested that Murray had some knowledge that formed the ground for the suggestion that the stamps had been taken with intent to resell. Mr. Murray disclaimed knowledge of any facts that he had not disclosed, and denied that he had himself believed it possible that the stamps could in fact be resold. He explained the statement in the letter as arising from suggestions of the Government auditor as to the best thing to do at the time.

The Court is faced with the task of deciding upon the evidence, an outline of which I have endeavoured to give, whether the appellants have satisfied the onus that I think is upon them, of establishing payment to the Crown of the sums they received from their customers for the excise tax in question. The question is entirely a question of fact. Summarizing the evidence, it appears to me that some matters are reasonably free from doubt. As I have already said, the evidence establishes the purchase of excise stamps to the required amount for the purpose of the tax. It is clear also that, so far as the persons having the management of the business are concerned, their directions to the persons to whom was assigned, from time to time, the duty of using the stamps purchased, were that they should be affixed to sheets on which should appear a statement of the tax to the payment of which the stamps were appropriated, and the period covered, and that the stamps should be cancelled, and that the sheets, with cancelled stamps affixed,

should be put in a file kept in a cabinet in the manager's office. It is also fairly to be concluded from the evidence that these managers were confident that their directions were followed, and while the evidence does not definitely establish that any of them actually made a check of the value of stamps from time to time affixed, they did examine, at times, the sheets in the file, and saw that stamps were affixed to them and cancelled. There is also evidence of others in the office that they saw, from time to time, the operation proceeding of the affixing and cancelling of stamps by the person charged with that duty at the time. There is evidence of a number of witnesses that the file continued to increase in bulk, and evidence of a somewhat more definite character as to its size and contents.

This evidence is sufficient, in my opinion, to establish that, in general, the directions of the managers were in fact carried out, and that the stamps purchased were applied in the fashion described, to the payment of this excise tax. With great respect, I am unable to escape the conclusion that to find appellants to be debtors to the Crown for the full amount of the tax accrued in the six-year period is a result that works injustice. It is true that appellants cannot produce the cancelled stamps. The same misfortune might happen to a broker who had observed the regulations with meticulous care. In a period of six years there are many risks. The risks of fire and burglary, of the accidental mixing of files by employees, of stamps becoming detached (of which danger there is evidence), and others, are always present. Against these risks appellants protected the stamp file in the same manner as they protected their confidential documents, and, if I may venture an opinion on the matter, the stamps on this file were much better protected against the dangers of interference or loss than they could possibly have been if attached to thousands of duplicate memoranda of individual sales, collected over a period of six years, with the other records of the business. Like most business concerns, appellants had first to carry on their own business, otherwise there would have been no taxes to collect and account for. The computation of the tax, the purchase and affixing and cancellation of excise stamps had, of necessity, to be done by members of their staff in the course of business. The records of the business were made by the staff and, of necessity, the members of the staff must have access to them. I am unable to find evidence in this

case that will support a finding of negligence on the part of the appellants in their effort to preserve the cancelled stamps that would warrant the Court in imposing upon them liability for the full amount of this claim because they are unable to produce any of the cancelled stamps.

So far as affixing the stamps to single sheets and cancelling them with pen and ink or a rubber stamp, instead of by perforation, are concerned, appellants' system did not differ essentially from the practice followed by other brokers whose methods were described in evidence and had the approval of the Government auditors. The method of cancellation was much the same. As to affixing the stamps to a periodical recapitulation of the sales, bound in with the book-keeping records of the business, as was done by some others, although the learned trial judge contrasts unfavourably with that method appellants' practice of affixing the stamps to separate sheets kept together on a file, I am unable to see any great practical advantage in the former. Neither practice was a compliance with the regulation that stamps be affixed to a duplicate memorandum of each individual sale. Both were done only periodically and both required reference to the memoranda of the individual transactions, if their accuracy was to be fully checked. It is true that appellants' whole file could more easily be carried off, but, on the other hand, it could be more safely locked up, and it was much less open to access by members of the staff than the bound-up records of the business. As practical methods both were probably superior to that prescribed by the regulations, and undoubtedly they saved the Government auditors much time and labour. In view of the rather extensive use, as disclosed by the evidence, of methods similar to that in use by appellants, and the lack of criticism by the auditors, it would seem impossible to charge appellants with any bad motive, or even with indifference in their departures from the regulations. Undoubtedly, they intended that the tax should be received by the Government, and believed that it was received.

There remains, however, one further question. While it is possible to draw inferences favourable to appellants from the evidence that I have, so far, reviewed, is it necessary for appellants to carry the matter further and to show by direct proof that all the stamps purchased for the purpose were actually affixed and cancelled as intended? In other words, must appel-

lants adduce evidence that their employees did all that they were instructed to do? If such evidence is necessary, then it must be said that it is lacking for the period before Legere was assigned this duty, and while Legere himself gave evidence for the period commencing early in 1937 (except for the short period in 1940 when McLennan acted) respondent's counsel says that the evidence of Legere should not be relied upon.

There is, as already stated, a good deal of evidence that the employees whose duty it was from time to time to affix and cancel the stamps, were, at times, occupied in doing so, and that there was an increasing file of cancelled stamps, but no one has said that there were \$51,487.43 worth. There having been stamps to that total value, however, purchased and supplied, it would seem to follow, of necessity, that if the stamps, or some part of them, were not used for their intended purpose, it was because some one or more of appellants' employees wilfully misappropriated them. Probably no one but the employees concerned can say that they did not, but there is a presumption that they did not. "There is a general presumption that all acts and conduct are in accordance with law and morality": Halsbury's Laws of England, 2nd ed., vol. 13, p. 628. The rule is an old one, but it is still constantly applied, and there are many reported cases that illustrate it. It applies even in cases where, in the result, the burden of proof is put on the party alleging a negative: *Williams v. The East India Company* (1802), 3 East 192, 102 E.R. 571. The circumstances in the case of *Evans v. Birch* (1811), 3 Camp. 10, 170 E.R. 1289, are not altogether dissimilar from the present case. A servant had been in the habit of receiving sums of money for his master, and the established course of dealing was that the servant paid these sums to his master from time to time without any writing between them, and the presumption was made that the servant regularly paid to his master all the sums so received.

In my opinion this rule may be applied, and I think, further, that it ought to be applied. The absence of evidence on the part of the Crown (except by way of admissions of appellants on discovery, and one witness in reply to testify to the purchase of perforators by the Department) has its significance. Soon after the visit of the Government auditor on 8th July 1940, in addition to investigations by the auditors and the police, there was an enquiry before a commissioner, and witnesses were ex-

amined on oath. Employees of appellants were examined, including a number who were witnesses at the trial of this action. The respondent had, therefore, more than the usual opportunity to investigate, and to become informed of all the facts and circumstances surrounding the case. There are only limited uses to which excise stamps may be put, and those who use them are all known to the Government and are subject to inspection. The vendors of excise stamps are also known to the Government, and there is evidence that indicates that the Government also inspects them. Yet there is no evidence suggesting that there has been anything irregular on the market for these stamps, such as would be bound to make its appearance if stamps to any considerable value were being traded in unlawfully. Some one who had a use for excise stamps would be found to have used more stamps than he had purchased from the regular vendors, if there were a continued supply coming on the market from an improper source. Indeed, it would seem impossible that any one in the position of one of appellants' employees could profit by stealing any of the stamps unless he had a confederate to take them off his hands and pay for them. I am aware that in cases of defalcation schemes are devised that are much more clever than any that I can conceive, but the matter I am commenting upon is the improbability of a market for any considerable value of these excise stamps existing without some knowledge of it coming to the Government investigators. The trial commenced over two years after the discovery that the file of stamps was lost and inquiries began. There is not only no evidence at all that the Crown has lost any of its revenue that should have been derived from the purchase and use of excise stamps, but there is no evidence of any situation or condition whatsoever existing that invites inquiry, or the need of explanation, except appellants' missing file.

Beyond question, the file is missing. McLennan and Legere, who are the only persons in appellants' service at the time it was missed who can reasonably be considered as having any possible interest in removing it, both deny that they did so and disclaim any knowledge of what became of it. McLennan is an old employee who had little to do with the file, although he admits some general oversight of it as part of his duties, and early in 1940 he had, for a time, the duty of affixing and cancelling the excise stamps to sheets for the file. Legere had, for

three years, the immediate duty of affixing and cancelling the stamps. Legere, unfortunately, has a former conviction for theft against him—ten years old, it is true—but it was a proper matter to bring out in cross-examination as relevant to his credibility. As to both these men, it is the fact that they put on the file, where it might at any time be seen, the evidence that would at once convict them if there was any misappropriation of stamps. The file was always available to the inspection of the manager, and they could not know when he might examine it. There was, on the other hand, so far as the evidence indicates, no knowledge on their part of the visit of the Government auditor on 8th July 1940, until he came and enquired for the file, and from then the search for it was on. To get rid of the file at that time would have been a matter of difficulty, and yet until then there was no reason for acting differently from the course of conduct pursued over a long period. Suspicion there may be, but, in my opinion, there is no evidence at all that would warrant attaching to either of these men the responsibility for a crime. In my opinion their denials should be accepted.

I have throughout, in discussing the evidence, made no distinction between the taxes on customers' sales and taxes on appellants' own sales. The conclusions of fact relevant to the one must, I think, be the same for the other, and I would make the same finding in each case.

This is not a case where, in my opinion, the Court of Appeal should evade its duty to give the judgment that, in its opinion, ought to have been pronounced. Neither party suggested that there was any evidence available that was not presented at the trial, and in view of the extensive inquiry made before action was brought, it seems improbable that anything further would be forthcoming on a new trial. It is an expense that neither the parties nor the public should be put to, except for good reason. In my opinion, therefore, the appeal should be allowed, and the action dismissed, both with costs.

HENDERSON and GILLANDERS JJ.A. agree with ROBERTSON C.J.O.

KELLOCK J.A.:—This is an appeal by the defendant from the judgment of Hope J., dated 13th January 1943, after a trial without a jury, in favour of the plaintiff. The amount recovered

represents taxes payable under the provisions of The Special War Revenue Act in respect of sales of certain unlisted securities in which the appellant acted as broker for the vendors, and in some cases was itself the vendor.

By s. 58(2) of the Act there is imposed on every change of ownership consequent upon a sale, an excise tax, dependent in amount upon the selling price, in the case of shares, and upon the par value, in case of bonds. By s. 60, the tax is payable in excise tax stamps by the vendor, transferor or assignor. The Governor in Council is, by the section, authorized to prescribe "the manner in which" and the persons by whom the amount of the tax is to be computed and collected for and on behalf of His Majesty.

The period in question in the action is from 1934 to 1940, and during that period the regulations were not always the same. Prior to 1st June 1937, it was provided by regulation 2 that the tax was to be paid to the Crown by the vendor stock-broker affixing stamps of the proper value to a duplicate memorandum of sale to be retained by the broker. By regulation 15 the broker was required to cancel the stamps by perforation of the stamps, and the memorandum, in a specified manner.

After 1st June 1937, it was provided by the new regulation 2 that the broker should "account" for the tax payable, and "pay the tax" by affixing the stamps to a memorandum of sale. Regulation 12 provided for a method of cancellation similar to that previously provided.

The evidence establishes that the appellant received from the vendor of the securities here in question the funds with which the proper stamps were to be purchased by it, and the learned trial judge has found as a fact that the appellant duly purchased stamps to the aggregate value of the amount claimed. These stamps were purchased from authorized agents of the Crown. The appellant admits that the stamps were not affixed to the memorandum of sale and perforated in accordance with the regulations. According to the evidence on the appellant's behalf another course was followed. The appellant, after purchasing the stamps, affixed them, generally monthly, to sheets of its letter paper and marked them, sometimes by drawing through them with pen and ink a line or lines with the initials of the person so engaged, and sometimes by a rubber stamp, which impressed a straight line or lines across the stamp. Some-

times the sheets and not the stamps were initialled. No witness is produced who is able to say definitely that throughout the period stamps in a sufficient amount were thus dealt with. One or two witnesses do so state as to parts of the period. Others state that they cannot speak either as to the value of the stamps or the periods to which they were relevant. The learned judge has made no finding on this evidence. The stamps were not purchased in denominations that permitted stamps for the proper amount to be affixed to each memorandum of sale, but stamps sufficient in the aggregate for the tax in respect of the monthly sales were purchased. It is admitted that in one instance, at least, a number of months went by when no purchases were made, but this was made up by subsequent purchases. The file said to contain these sheets is missing and could not be produced in July 1940 when an inspector appeared at the appellant's premises for the purpose of examining its records. The employee whose duty it was to affix the stamps to the sheets at that time gave evidence that he had had it in his possession in the latter part of June. No explanation is made on the appellant's behalf for its non-production other than that it could not be found, but there is a suggestion by one of the witnesses that the appellant had been making some changes in its office arrangements which involved the moving of files, which might have resulted in its being misplaced. While appellant engaged auditors, these auditors did not include in their investigations any examination of the tax transactions subsequent to the purchase of stamps.

The respondent alleges that the appellant collected from its clients, the vendors, the sums due for the tax but failed to pay the same to the Crown or to account therefor in accordance with the statute and the regulations, and also that it failed to affix and cancel the stamps as required by the regulations. Alternatively the respondent alleges that the appellant failed to cancel the stamps and negligently allowed them to be taken out of their possession so as to permit of their further use and that thereby the Crown has suffered damage. The respondent claims the full amount as a debt, or as damages for breach of duty. It is therefore necessary to consider the position in law of the appellant.

As already pointed out, the tax is imposed by s. 58(2) on every change of ownership consequent upon the sale. It would

appear that the appellant received the money for the tax by deduction from the sale price of its clients' securities after the transactions of sale had taken place. Accordingly, the tax having become due on the change of ownership, the appellant became the debtor of the Crown in the amount represented by the moneys received by it for payment of the tax: *Rex v. Ward* (1836), 2 Ex. 301, 154 E.R. 507; *Reg. v. Adams and Warren* (1848), 2 Ex. 299, 154 E.R. 506; *Rex v. Wrangham* (1831), 1 Cr. & J. 408, 148 E.R. 1481, and *In re West London Commercial Bank* (1888), 38 Ch. D. 364.

The onus resting upon the appellant of establishing payment of this debt would, in my opinion, only be discharged by showing appropriation to the particular transactions and cancellation of the stamps so as to prevent their further use.

The learned trial judge based his judgment upon the failure of the appellant to affix the stamps and cancel them in strict accord with the regulations. In my view, while failure to follow the regulations might bring upon the appellant the penalty provided by s. 63(2), it does not have the effect of continuing the appellant as a debtor of the Crown in respect of the monies received by it for the stamp tax, if the stamps were appropriated to the particular transactions and effectively rendered useless by any means.

In my opinion the burden resting upon the appellant in the circumstances here present would be exactly the same if, when it was called upon to show payment of the tax, cancelled stamps were not forthcoming. The method actually employed to effect cancellation would not affect the inquiry to be conducted. This would be (1) were stamps purchased to the proper amount; (2) were they applied to the particular transactions, and (3) were they effectively rendered incapable of further use? If after having been appropriated they were destroyed by fire before cancellation, their destruction, in my opinion, would be just as effective in discharge of the Crown's debt as cancellation in strict accord with the regulations.

The question arises as to whether the case should be sent back for a new trial or whether this Court should determine, on the evidence, the question involved. I have reached the conclusion that this Court should make the finding on the evidence submitted. I have had the advantage of reading the reasons for

judgment of my Lord, and agree in his analysis of the evidence and conclusion.

LIDLAW J.A.:—This is an appeal from the judgment of Hope J., dated 13th January 1943, whereby the appellant was ordered to pay the respondent the sum of \$51,487.43 and costs of the action. It is alleged that during the years 1934, 1935, 1936, 1937, 1938, 1939 and 1940 the appellant effected the sale of shares and bonds otherwise than on a stock exchange, on behalf of its various clients as transferors or vendors: that the appellant collected the said sum from its clients as vendors of the shares; that it is owing (to the respondent) for taxes under and by virtue of The Special War Revenue Act, R.S.C. 1927, c. 179, as amended, or in the alternative for damages for breach of the duty imposed by the said statute and regulations made thereunder and for failure to perform or negligence in performing the said duties. The appellant denies that it failed to pay the sum to the respondent by the purchase of transfer tax stamps; also it denies that it was guilty of any negligence or breach of duty whatsoever. It says, *inter alia*, in its statement of defence “that [the defendants] computed the taxes payable by them, if any, accounted for such taxes, paid such taxes by affixing excise stamps of the requisite value to memoranda of the sales in question kept in the defendants’ office, and cancelled the said stamps”; that “without any fault or negligence on their part, the said memoranda with cancelled excise stamps affixed as aforesaid were stolen, lost, or disappeared from the defendants’ office”; and that the stamps were “cancelled in fact and in law and that the plaintiff has sustained no loss or damage”.

I examine first the relevant provisions of The Special War Revenue Act and amendments thereto and regulations made thereunder.

S. 58(2) provides that an excise tax “shall be imposed, levied and collected upon every change of ownership consequent upon the sale, transfer or assignment of any bond, or of any share”.

I quote s. 60, as follows:

“The said tax shall be payable in excise tax stamps by the vendor, transferor or assignor, and the Governor in Council may make regulations prescribing in any case or class of cases the manner in which and the persons by whom the amount of such

tax shall be computed and collected for and on behalf of His Majesty”.

S. 62 reads in part: “Every person liable under this Part or under regulations made hereunder to collect or pay the tax imposed by section fifty-eight of this Act, shall keep records and books of account . . . adequate for the purposes of this part”.

S. 99 empowers the Minister of Finance or the Minister of National Revenue to make “such regulations as he deems necessary or advisable for carrying out the provisions of this Act”.

S. 100 empowers the Minister to direct stamps to be prepared for the purposes of the Act.

S. 101 reads:

“In any case in which an adhesive stamp is required to be cancelled, and no other method of cancellation is prescribed, such stamp shall be deemed to be cancelled if lines or marks are drawn across or impressed thereon so as effectually to render the stamp incapable of being used for any other instrument”.

S. 102 provides for the appointment by the Minister of persons to sell stamps prepared for the purposes of this Act.

S. 108(1) is as follows:

“All taxes or sums payable under this Act shall be recoverable at any time after the same ought to have been accounted for and paid, and all such taxes and sums shall be recoverable, and all rights of His Majesty hereunder enforced, with full costs of suit, as a debt due to or as a right enforceable by His Majesty, in the Exchequer Court or in any other court of competent jurisdiction”.

Under authority of s. 60 of the statute, regulations were established by His Excellency the Governor-General in Council, with effect from 26th May 1932. For convenience I refer to these as the “first regulations”. These were repealed and in their place regulations were substituted with effect from 1st June 1937, and I shall refer to them as the “second regulations”. I refer to or quote relevant parts of the regulations in force from time to time numbered as follows:

2. (*First regulations*):

"Sales of Securities by Stockbrokers—Not Executed on Stock Exchanges.

"That where any stockbroker, acting either as principal or agent, effects the sale of a taxable security by means of a transaction which is not executed on a stock exchange in Canada, the tax exigible on the transaction is to be paid to the Crown by the vendor stockbroker affixing excise tax stamps of the requisite value to the duplicate of the memorandum of sale retained on file in his office".

2. (*as replaced by the second regulations*):

"Sales by Stock Brokers.

"Every stock broker who effects the sale of any bond or share shall compute the tax payable and account therefor as follows:—

"(a) if the sale is effected upon a stock exchange pay the tax to the exchange and the exchange shall pay the Receiver General, as hereinafter provided, or

"(b) if the sale is effected otherwise than on a stock exchange, pay the tax forthwith by affixing excise stamps of the requisite value to a memorandum of the sale to be kept in his office".

Regulation 12 of the first regulations shows the sales records required to be kept by all stockbrokers. In all instances of the kind in question they were required,

"(a) to prepare a memorandum in duplicate of the sale;

"(b) to deliver the original of such memorandum of sale to the purchaser;

"(c) to retain the duplicate of such memorandum of sale on file in their office until such time as official permission is given for its destruction".

Regulation 9 of the second regulations reads in part:

"Every bank, bond dealer, stock broker, or trust company which sells a bond or share, either as principal or agent, shall:—

"(a) prepare a memorandum in duplicate of the sale;

"(b) deliver one copy of such memorandum to the purchaser;

"(c) retain one copy on file until such time as official permission is given for its destruction".

Regulation 15 of the first regulations provides for the affixing and cancellation of excise tax stamps by stockbrokers and others. It reads as follows:

"That all stockbrokers, banks, trust companies, and bond dealers upon whom is imposed the duty of affixing excise tax stamps in accordance with the provisions of The Special War Revenue Act and the regulations thereunder established shall be and are hereby required;—

"(a) to affix the said stamps securely to the proper documents, memoranda, books, etc.;

"(b) to cancel the said stamps by means of a perforator which shall perforate six holes of at least one-eighth of an inch in diameter through each stamp and the document to which same is affixed, or, in the alternative, the perforator may form the word 'cancelled' or the initials of the company, regardless of the dimensions of the perforations;

"(c) to provide an instrument for making such perforations."

This regulation is not changed in any material way by the second regulations, in so far as it concerns the questions in appeal.

The system established by the statute and regulations in respect of every transaction of the kind in question requires a stockbroker:

- (1) to compute the correct amount of tax payable;
- (2) to prepare a memorandum of sale in duplicate;
- (3) to send one copy of the memorandum to the purchaser and retain the other copy on file in his office;
- (4) to obtain excise tax stamps to the amount of the tax payable;
- (5) to affix the stamps of the requisite value to the duplicate of the memorandum of sale retained on file in his office;
- (6) to cancel such stamps by means of a perforator and in a manner particularly specified;
- (7) to retain the copy of the memorandum with the cancelled stamps affixed thereto, until such time as official permission be given for its destruction.

The appellant did not comply with the requirements of such a system. On the contrary it chose, for reasons of convenience, to adopt one designed in its own office. The appellant's practice and system was as follows:

- (1) to compute the tax payable; prepare a memorandum of sale in duplicate; send one copy to the purchaser and retain

the other copy on file in its office, all as required by the statutory system;

(2) to note and record all sales on a daily statement called a "blotter"; and at the end of each month on a monthly blotter, showing amongst other things the total amount of tax payable in respect of all transactions during that period;

(3) to purchase from time to time from an authorized vendor excise stamps of a requisite value to meet the amount of tax shown by the monthly blotter to be payable;

(4) to affix such stamps to a sheet or sheets of letter paper bearing a reference to the month and year in respect to which the stamps represented the tax;

(5) prior to July 1937, to cancel the stamps by the initial or initials of an employee written in ink on each stamp;

(6) after July 1937, to cancel the stamps by means of a rubber stamp and for a period by "striking a fountain pen through them and initialling the sheet";

(7) the sheets with stamps affixed and cancelled in the manner indicated were placed in a folder and kept for some time in a desk drawer, of the appellant's employee in charge of unlisted stock transactions, and later in a filing cabinet in the manager's office.

In July 1940 a Dominion transfer tax auditor sought to make an audit of the transfer tax payable on stock transactions in the appellant's office. The file said to contain the sheets with cancelled stamps affixed thereto was missing and could not be found. In consequence this action was commenced on the 24th October, 1941, and the relief claimed by the respondent is,

"(a) Judgment for \$51,487.43.

"(b) An order directing the defendants to affix excise stamps to memoranda of sales, in accordance with the statute and regulations above set out and to cancel them in compliance with the said statutory regulations.

"(c) A declaration that the plaintiff is entitled to an order in the nature of a prerogative writ of mandamus directing the defendants to fulfil the duty imposed upon them by the statute and regulations of affixing and cancelling excise stamps as aforesaid.

"(d) Damages in the amount of \$51,487.43 for breach of the duty imposed by the said statute and regulations and for failure to perform or negligence in performing the said duties.

“(e) Such further and other relief as to this Honourable Court may seem just.”

It is essential at the outset to ascertain and clearly define the relationship existing in law from time to time between His Majesty the King, the appellant, and the vendor, transferor or assignor, with respect to the tax imposed on the stock transactions in question. This inquiry involves a study of the nature of the tax. It is quite clear that the tax is imposed by the Act on the “change of ownership” of shares of stock. It attaches to each stock transaction, but liability for payment of the amount of the tax is expressly imposed on the vendor, transferor or assignor. The tax is payable in special excise stamps obtainable from authorized Government stamp vendors. These stamps are a medium of payment usable by all stockbrokers and others of the public on certain instruments and in connection with other transactions. They are a form of currency with a face value thereon to the possessor, notwithstanding the limitation on the use of them. Under the system of collection and payment of tax as carried on by the appellant, it received funds from its customers with which to buy stamps of the requisite value to meet the customers’ obligations. In performing this service the appellant acted as an agent of its customer. The agency began when the funds to purchase the stamps were made available to the appellant. It ended when the stamps were purchased. At the same time, under the statute and regulations thereunder, the appellant was made an agent for and on behalf of His Majesty to collect the tax, payable in stamps, from the vendor, transferor or assignor. That agency commenced immediately the tax became payable and it did not end until payment of the tax was completed. Payment of the tax was not completed when the money was paid by the vendor, transferor or assignor to the stockbroker. To complete payment, three essentials existed, *viz.*: (1) buying the stamps; (2) applying the stamps to the transaction in respect of which they were payable; and (3) effective cancellation of the stamps. Delivery of the stamps to the stockbroker did not thereby terminate the agency of the appellant, but in my opinion such agency continued until all requisites of complete payment, as mentioned, were satisfied. But the relationship of the various parties does not depend solely on the system of the appellant, as directed by the

statute and regulations. It is important also to ascertain the relationship existing at common law.

I therefore examine the position and capacity of the parties apart from the statute. Immediately the money representing the amount of the tax came into the possession of the appellant, it became a debtor of His Majesty. In *Rex v. Wrangham* (1831), 1 Cr. & J. 408, 148 E.R. 1481, Lord Lyndhurst C.B. says: "The defendant is indebted directly to the King. Whoever receives money of the Crown, becomes an immediate debtor to the Crown. The receipt of money belonging to the Crown constitutes a privity with the Crown." Parke B., in *Rex v. Ward* (1836), 2 Ex. 301, 154 E.R. 507, says: "The law is, that any one is in privity with the Crown who knows that the money which he receives is the money of the Crown". See also *Reg. v. Adams and Warren* (1848), 2 Ex. 299, 154 E.R. 506; *In re West London Commercial Bank* (1888), 38 Ch. D. 364. At this time, therefore, the appellant was in a dual capacity. It was an agent of its customer, as described, and also a debtor of His Majesty. When did this capacity end? The amount of money to satisfy and discharge the debt was delivered to a Government stamp vendor who was an agent of His Majesty appointed to receive it. Moreover, the learned trial judge has found as a fact ([1943] O.R. at 124) "on the evidence, that the defendants duly purchased stamps in the aggregate value of the amount now claimed". In this respect the case now under consideration differs from the ones above referred to. Nevertheless, I am inclined to think that the appellant continued to be a debtor of His Majesty after the stamps came into its possession and remained in such relationship until payment as described was complete. The stamps, as I have said, were a form of currency received by the appellant in exchange and substitution for money; such exchange and substitution does not amount to a waiver by the Crown of its right to have the debt discharged by complete fulfilment of all requisites. But in the view I take and at once discuss it is not necessary to determine this question.

I think that immediately the appellant received excise stamps in exchange for the amount of tax paid by it to the stamp vendor, a new capacity and relationship of the appellant to His Majesty was created. In my opinion the appellant thereupon became a trustee for His Majesty, and subject to all the obligations and liabilities attached by law to a person in such a posi-

tion. It is difficult to find a completely satisfactory definition of a trust, but it has been said that a trust may be regarded as "an obligation" that is to say "a tie of equity (*vinculum juris*), whereby one person is bound to perform or forbear some act for another": Underhill's Law of Trusts and Trustees, 9th ed., pp. 5-6, quoting from Encyclopædia Britannica, 14th ed., Article "Obligation", vol. 16, p. 668. Also: "A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called beneficiaries or *cestuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation. Any act or neglect on the part of a trustee which is not authorized or excused by the terms of the trust instrument, or by law, is called a breach of trust": Underhill, *op. cit.*, p. 3. The trust is a special one, that is, one "in which a trustee is appointed to carry out some scheme particularly pointed out by the settlor, and is called upon to exert himself actively in the execution of the settlor's intention": *ibid.*, p. 11.

I shall now consider certain duties of the appellant and rights of His Majesty, arising out of the relationship between them. It was the duty of the appellant to collect the proper amount of tax payable in stamps, to affix the stamps, to cancel the stamps, and to keep adequate records as described in the statute and regulations. Also, apart from and independently of the statute and regulations, it was the duty of the appellant as trustee:

- (a) to keep clear and accurate accounts of the trust property;
- (b) at all reasonable times, at the request of the beneficiary, to give it full and accurate information as to the amount and state of the trust property, and permit it to inspect the accounts and vouchers and other documents relating to the trust: Underhill, *op. cit.*, p. 359. It was the right of His Majesty to have payment of the tax made by the appellant in the precise manner and exactly in accordance with the scheme particularized in the Act and regulations. A repository was designated; means were expressly specified to ensure against repeated use of the excise stamps and consequent loss to His Majesty; and it was obligatory on the part of the appellant to keep adequate records and books of account for the purposes of the Act.

It is admitted that the appellant did not perform the duties imposed on it by the statute and regulations. I am of the opinion

that it also failed to perform the duties owing by it to the Crown by reason of the trust relationship existing between the parties. But such a fact does not of itself make the appellant liable to the Crown for the amount of tax in question in this action or for damages. Before the respondent can succeed in this action, there must be a breach of duty on the part of the appellant and also loss by the Crown resulting therefrom. The amount of such loss, if any, must be ascertained by the Court. The Court must make two essential findings of fact in answer to two questions, *viz.*: (1) Did the respondent sustain any loss by reason of breach of duty owing to it by the appellant? (2) If so, what is the amount of such loss? This inquiry necessitates a clear understanding and definition of the object sought to be accomplished by the part of the statute and regulations pertaining to cancellation of excise stamps. It is declared, and abundantly clear, that it was intended that a stamp should be used only once and having been used must be mutilated "so as effectually to render the stamp incapable of being used for any other instrument." (s. 101). The precise method of cancellation is specified, but I think the failure to use that particular method does not necessarily result in loss to His Majesty. On the contrary, so far as this question is concerned, the cancellation can be performed in any manner whatsoever, so long as the required result is obtained. Likewise, the failure of the appellant to affix stamps to a copy of the memorandum of sale does not in itself cause loss to His Majesty. There may be no connection whatever in law between such a wrongful omission and the alleged loss. The requirement of effectual cancellation is the paramount matter for consideration. The Court must find as a fact whether the various methods of cancellation used from time to time by the appellant satisfied the object of the statute as defined. Were all the stamps in question so cancelled? If so, the respondent cannot recover from the appellant any sum whatever. If only some of the stamps were so cancelled, the respondent is entitled to recover from the appellant the value of the remainder of them. The evidence shows that Legere, an employee of the appellant, cancelled the stamps during the period prior to July 1937 by putting his own initials, either "L" or "G.C.L."; with pen and ink on each stamp. No other marks were put on them. In July 1937 he commenced to use a rubber stamp, "a straight bar", for the purpose of cancellation. The stamps were "affixed

to a letterhead", and he says "There might be a row across this way, you see, and the stamp was just applied in the centre more or less. I never made any special impression on it at any time, just hit it as I went along across and sometimes down." At a later period the rubber stamp was missing and the method of cancellation then used by an employee McLennan is described by him as follows: "To the best of my knowledge I cancelled by striking my fountain pen through them and initialling the sheet."

The sheets to which the stamps were affixed did not form part of the accounting system in the appellant's office. There was no record of the value of the stamps actually affixed to the sheets, and the appellant's auditors were not required to audit the tax records. It would appear quite possible that stamps of the requisite value to equal the total amount of tax in question were not affixed to the sheets. This might occur through intentional wrongful act on the part of some person or persons, or merely through neglect. The appellant contends that in any event it is only liable to account for the very thing collected. I do not agree. The nature of the trust property must be considered and it is manifest that if the stamps intended to be appropriated to a stock transaction were not so used and effectively cancelled they might be used at their face value by any possessor of them for other transactions. Then a loss would result directly to His Majesty by reason of breach of duty of the appellant. It is for the appellant to account for the value of the stamps which came into its possession.

These questions of fact involve at once an important question of law, *viz.*: "Does the burden of showing that His Majesty sustained loss, and the amount thereof, by reason of breach of duty owing to him by the appellant rest on the respondent?" I think it does not. The appellant established a system to meet its own convenience different from the one described and required by the statute and regulations. It assumed the responsibility of making its system and records in connection therewith adequate fully to meet its obligations. In *In re Brogden; Billing v. Brogden* (1888), 38 Ch. D. 546, Cotton L.J., at p. 567, says: "In my opinion it is not for the *cestuis que trust* seeking to make the trustee liable, to shew that if he has done his duty he would have got the money for which they are seeking to make him answerable. It is the trustee who is seeking to excuse himself

for the consequences of his breach of duty. . . . Once shew that he has neglected his duty and *primâ facie* he is answerable for all the consequences of that neglect". Fry L.J., at p. 572-3, says: "When the *cestui que trust* has shewn that the trustee has made default . . . the *cestui que trust* has made out, in my judgment, a *primâ facie* case of liability upon the trustee, and if the trustee desire to repel that by saying that if he had done his duty no good would have flowed from it, the burden of sustaining that argument is plainly upon the trustee."

It may be observed also that in cases falling within the provisions of The Trustee Act, R.S.O. 1937, c. 165, s. 34, when a trustee is or may be personally liable for any breach of trust he cannot be excused unless he can show that he acted honestly and reasonably, and ought fairly to be excused. In such cases the onus of proving honesty and reasonableness is cast upon the trustee: *Re Stuart; Smith v. Stuart*, [1897] 2 Ch. 583.

I may add now that if the appellant was not a trustee, but was a debtor of His Majesty after the time it received stamps into its possession, the same findings of fact as I have discussed must be made by the Court and the same burden of proof rests on the appellant.

I shall now consider, and briefly discuss, the following points of argument presented to the Court by counsel on behalf of the appellant:

(1) "There is no debt due the Crown by the appellant which is recoverable under s. 108 of The Special War Revenue Act. The provisions contained in this section do not create and impose on the appellant any liability to the Crown for the amount of tax payable on any of the stock transactions in question." The appellant does not, by virtue only of this section of the Act, become a debtor to the Crown. The section is one of procedure only. It provides for the time when proceedings to recover taxes or sums payable under the Act may be commenced and the courts in which rights of His Majesty arising under the statute may be enforced. But as I have indicated the rights of His Majesty, in the particular circumstances of this case, do not depend on the statute, nor are they founded on rights contained in s. 108.

(2) "The regulations made under the provisions of the statute exceed the authority delegated to the Governor in Council in so far as they purport to make any tax payable by the appellant

to the Crown, or purport to impose obligations upon the appellant subsequent to computation and collection of the tax from the taxable persons." It will appear from what I have said that the appellant's liability, if any, is not based upon an obligation created by the regulations or any part of them to make any tax payable by the appellants to the Crown. As to obligations imposed upon the appellant subsequent to the computation and collection of the tax from taxable persons, I can find no part of the regulations beyond the authority of the Governor in Council. The word "collection" must be given a meaning in keeping with the system described in the Act, and the purposes intended to be served. It is not limited in meaning to "receipt". It includes also the act of assembling the stamps in the repository specified by the regulations, the accumulation and getting together in one place. See Imperial Dictionary; Murray's New English Dictionary.

(3) "The statute which creates the obligation provides the remedy for breach of the regulations. The breach of statutory duties by the appellant subjects it to prosecution by the Crown, and to the penalties." But the common law rights of His Majesty are not taken away, or modified in any way, by the provisions of the statute. On the contrary, the Crown continues to possess and may enforce such rights notwithstanding the provisions of the statute.

(4) "If the appellant be an agent of the respondent the agent is only required to account to his principal in such manner and to the extent and with such consequences as are established by law." This point of argument must fail because the relationship of the appellant to the respondent was not that of a mere agent to a principal, but as I have shown was that of a trustee to a *cestui que trust*.

(5) "The excise tax stamps were cancelled as effectively as if the same had been cancelled by perforation. In any event, no loss has been proved, and no damage has been suffered by the respondent." These are matters of fact to be proved by evidence and it lies on the appellant, for reasons given, to satisfy the Court in respect to them. It has been said, however, that a trustee cannot plead that the breach was immaterial: Underhill, *op. cit.*, p. 499, quoting *Bateman et al. v. Davis et al.* (1818), 3 Madd. 98, 56 E.R. 446.

(6) "The respondent is estopped from claiming against the appellant." I need not discuss cases relied upon by counsel on argument of the broad question of whether the principle of estoppel may be applied against the Crown. It is sufficient to say that in this case the respondent is not precluded from exercising its rights in respect to a claim resulting from a breach of trust on the part of the appellant. I venture the opinion, however, that evidence showing a practice of other persons contrary to the provisions of the law, and acquiescence, or even express assent thereto, by an auditor of the Crown, cannot justify a violation of duties expressly imposed by statute and cannot be relied upon to deprive the Crown of any rights possessed by it thereunder or at common law.

(7) "A prerogative writ of *mandamus* cannot be obtained in an action but only on originating notice of motion under Rule 622." No judgment was given at trial granting this relief to the respondent, and in view of my opinion on this appeal it is unnecessary to consider this point.

My opinion is that a new trial should be had to find the facts in answer to the questions I have proposed. Although this Court has ample power to draw inferences and make findings of fact on the evidence adduced at trial, and should do so in all proper cases, I think it cannot be done in this instance. The evidence submitted was not directed with any particularity to the questions and facts upon which judgment ought to be entered. On the contrary, it appears to me to be incomplete, general and indefinite. In view, therefore, of the unsatisfactory nature of the evidence, and the absence of findings of fact on the basic questions governing liability, and because it is doubtful whether sufficient, if any, regard was had to the question of onus, the parties ought to have an opportunity, at a new trial, to adduce all available evidence with detail and precision and to submit argument on all questions of law relating thereto. It may be suggested that the claim in this action is not made on the basis of a breach of duty on the part of the appellant as I have defined it to be, but I think leave ought to be given to both parties to make such amendments to the pleadings as may be deemed necessary or advisable to bring the real issue clearly before the Court.

The costs of this appeal should be paid by the respondent to the appellant. The costs of the former trial and the new trial should be in the discretion of the judge presiding at the new trial.

Appeal allowed with costs and action dismissed with costs, LAIDLAW J.A. dissenting in part.

Solicitors for the plaintiff, respondent: McRuer, Mason, Cameron & Brewin, Toronto.

Solicitors for the defendants, appellants: Lawson, Stratton, Green & Ongley, Toronto.

[COURT OF APPEAL.]

Gooderham & Worts Limited v. Canadian Broadcasting Corporation.

Radio—Powers of Commission and Corporation—Statutory Restrictions—Lease of Station—Covenant for Successive Renewals in Perpetuity—Termination of Lease—Liability under Covenants—Keeping Station “modern and up-to-date”—The Canadian Radio Broadcasting Act, 1932 (Dom.), c. 51, ss. 5, 9; 1932-33 am., c. 35, s. 2; 1935 am., c. 65, s. 1—The Canadian Broadcasting Act, 1936 (Dom.), c. 24, s. 25.

S. 9 of The Canadian Radio Broadcasting Act, 1932, c. 51, as amended by 1932-33, c. 35, s. 2, empowering the Canadian Radio Broadcasting Commission to acquire existing stations by lease or purchase, subject to the approval of the Governor in Council, is sufficiently wide to permit the Commission, when authorized by order in council to enter into a lease of a named station at a stipulated rental, to enter into a formal lease, and to arrange, without further express approval, additional terms in the lease, in accordance with leasing practice. If the lease provides for successive renewals in perpetuity, this clause is not void as constituting a perpetual lease, but it is beyond the authority of the Commission, under the order in council, and a nullity on that ground. It is, however, severable, and the lease will be valid for the term of three years. If the lessee continues in occupation after the expiration of the three years, a tenancy from year to year will be created, rather than a tenancy at will.

The Commission also has power, under such authorization, to enter into a covenant in the lease “to keep the whole of the demised premises modern and up-to-date”. Such a covenant must be construed with reference to the premises as demised, and does not obligate the lessee, if there are great developments in the practice of broadcasting, to construct a wholly new station, or acquire a new site.

Landlord and Tenant—Tenancy from Year to Year—Notice to Quit by Tenant—Validity—Notice by Conduct.

The defendant, being in possession of a broadcasting station under what was found to be a tenancy from year to year, running from 15th May in each year, gave notice in writing, in January 1938, purporting to be effective from 15th May following. Possession was vacated on 15th May 1938, but the plaintiff refused to accept the keys when tendered. A writ was issued, claiming, *inter alia*, a declaration that the defendant was the plaintiff's tenant under a yearly tenancy. *Held*, although the written notice, being notice of less than the required six months, was not effective to terminate the lease on 15th May 1938, and, being bad for the date on which it was given, could not be good for any subsequent date, yet the tenancy had in fact been terminated, as of 15th May 1939, by the conduct of the parties. A notice to quit need not be in writing.

AN appeal by the plaintiff, and a cross-appeal by the defendant, from the judgment of Greene J., [1942] O.R. 502, [1942] 4 D.L.R. 45. The facts are fully stated in the judgment of the trial judge, and in that of LAIDLAW J.A.

7th to 11th June and 21st June 1943. The appeal was heard by HENDERSON, GILLANDERS and LAIDLAW JJ.A.

C. F. H. Carson, K.C. (W. Judson with him), for the plaintiff, appellant: The validity of the lease is *res judicata*, by reason of the judgment in the third party proceedings between the plaintiff and the Commission in the action brought by the King Edward Hotel Company Limited against the plaintiff in 1935. A binding agreement to lease had been made between the appellant and the Commission before the enactment of the 1932-33 amendments, and the agreement was within the capacity of the Commission under The Canadian Radio Broadcasting Act, 1932, c. 51, ss. 5, 8 and 9, as it then stood. The first term of three years expired under the lease, but the Commission, and subsequently the Corporation, remained in possession and paid rent. The tenancy thus created was not one from year to year; the behaviour of both parties was consistent with the view that it was a tenancy under the lease, or that the lease had been adopted as the basis of the tenancy.

A covenant for perpetual renewal in a lease is valid and will be enforced, if the intention in that behalf is clearly shown. The lease now in question expressly provided for perpetual renewal. It is not, and does not purport to be, a lease in perpetuity. The trial judge did not differentiate between a lease in perpetuity, and a lease with a provision for perpetual renewals.

S. 9, in conjunction with s. 5, of the 1932 Act, gives the right to lease: see *Palmer's Company Law*, 16th ed., p. 52. The amendment to the legislation by 1932-33, c. 35, s. 2, whereby paras. (b) and (c) of s. 9 of the 1932 Act were repealed, and it became necessary to obtain the approval of the Governor in Council, still leaves the Commission with capacity to make this lease, by virtue of the broad powers conferred upon it by s. 5 and the introductory part of s. 9, which were not amended. Even if the 1932-33 amendment necessitated an order in council, that dated 27th May 1933 was sufficient. The amendment did not require that a specific lease, or the terms and conditions of a lease, should be approved. The order in council itself did not purport to approve a specific lease; it approved the making of a lease of described premises for three years at a named rental, and the other terms of the lease were left to negotiation between the parties.

The respondent's obligation to renew did not arise until the expiration of the first three-year term, on 15th May 1936. At

that time the legislation requiring approval by order in council had been repealed, and the legislation of 1932, without amendment, was again in force. By the 1935 amendment (c. 65, s. 1(3)), it was clearly provided that on and after 1st April 1936 the 1932 Act was to be read as if the intervening statutes had never been enacted. The capacity of the respondent at that time to acquire private stations by lease, without approval by the Governor in Council, was therefore beyond question: *Taylor v. The Directors, &c., of The Chichester and Midhurst Railway Company* (1870), L.R. 4 H.L. 628 at 639, 645; *In re "Otto" Electrical Manufacturing Company (1905), Limited; Jenkins' Claim*, [1906] 2 Ch. 390; *Hudson-Mattagami Exploration Mining Co. Ltd. v. Wettlaufer Bros. Ltd.*, 62 O.L.R. 387 at 397, [1928] 3 D.L.R. 661. The trial judge read the intervening legislation, and did not ignore it, as required by the 1935 Act.

We rely also on The Canadian Broadcasting Act, 1936, c. 24, s. 25, and by-law no. 3 of the respondent Corporation, which empower the Corporation to take possession of all property and assets, and assume all the obligations and liabilities, of the Commission.

Steel, as an officer and agent of the Commission, was quite able to enter into a valid and binding lease. The correspondence and negotiations were all of the nature to produce an enforceable contract: *Rossiter, Curtis et al. v. Miller* (1878), 3 App. Cas. 1124 at 1139, 1143; *Winn v. Bull* (1877), 7 Ch. D. 29 at 32; *Stow v. Currie* (1910), 21 O.L.R. 486 at 491; *Spottiswoode Balantyne and Company, Limited v. Doreen Appliances, Limited*, [1942] 2 K.B. 32; 20 Halsbury, 2nd ed., p. 42.

As to what constitutes acceptance and effects a formal contract, see *Dominion Building Corporation, Limited et al. v. The King*, [1933] A.C. 533 at 544, [1933] 3 D.L.R. 577, 41 C.R.C. 117, [1933] 2 W.W.R. 417. [HENDERSON J.A.: Had the Commission, in 1933, the right to agree to do something in 1936?] After the enactment of the 1935 Act, the situation was clarified beyond question. Even if the provision for renewal was bad, a new relationship of landlord and tenant was constituted by conduct and performance. There is no suggestion from the conduct of the respondent throughout that the lease was not in full force and effect, though it now takes the position that it was a tenant at will. It is a question of fact whether the tenancy was from year to year. Until December 1937 both the appel-

lant and the respondent were referring to the lease as binding and operative. Even if the lease had been bad in its inception, the parties concerned acted upon it by paying rent, receiving rent, and staying in possession: *Young v. Bank of Nova Scotia* (1915), 34 O.L.R. 176, 23 D.L.R. 854; *Re Lyons and McVeity* (1919), 46 O.L.R. 148, 49 D.L.R. 635.

[HENDERSON J.A.: Is there anything in the judgment of this Court in the *King Edward Hotel* case to say that a notice, bad for the date for which it is given, is good for another date?]

[GILLANDERS J.A.: How far does that judgment affect the case at bar?] By reason of that case, as previously mentioned, the validity of the lease is *res judicata*: *Hoystead et al. v. Commissioner of Taxation*, [1926] A.C. 155; *New Brunswick Railway Company v. British and French Trust Corporation, Limited*, [1939] A.C. 1; *Broken Hill Proprietary Company Limited v. Municipal Council of Broken Hill*, [1926] A.C. 94. It was fundamental to the issues in the *King Edward Hotel* case that a valid lease should have been in existence.

Under the renewal clause, there is an obligation on the lessee to accept a new lease at the expiration of the three-year term. [HENDERSON J.A.: If no new lease is executed at the end of the three-year term, what is the position?] The principal lease requires the lessee to take a renewal: *Guardian Realty Company of Canada v. John Stark & Company* (1922), 64 S.C.R. 207, 70 D.L.R. 333.

[HENDERSON J.A.: If this Court ordered specific performance, that would entail the rehabilitation of the broadcasting station.] That should be ordered, since specific performance means execution of the lease with all its covenants. Expropriation is always available to the respondent, and it is its responsibility to decide whether or not to expropriate. [HENDERSON J.A.: Are we bound to give you specific performance of whatever we find you are entitled to under the contract, or have we a discretion? In any ordinary sale of land, it should be a matter of right, but what is the position in the special circumstances of this case?]

If for any reason the provision for renewal is invalid, it is clearly severable, as found by the trial judge, and the lease is valid and effective for the three-year term: *The British American Fish Corporation, Limited v. The King* (1918), 18 Ex. C.R. 230, 44 D.L.R. 750; *Northern Ontario Power Co. Ltd. v. La Roche Mines, Ltd. et al.*, [1938] 3 All E.R. 755. However, it has been

clearly established that a covenant for perpetual renewal is valid and will be enforced if the intention in that behalf is clearly shown: 20 Halsbury, 2nd ed., p. 154; *Hare v. Burges* (1857), 4 K. & J. 45, 70 E.R. 19; *Swinburne v. Milburn et al.* (1884), 9 App. Cas. 844; *Re Jackson and Imperial Bank of Canada* (1917), 39 O.L.R. 334, 36 D.L.R. 589; *In re The Canadian Pacific Railway Company and The City of Toronto* (1902), 4 O.L.R. 134; varied 5 O.L.R. 717, which was varied [1905] A.C. 33, C.R. [13] A.C. 335.

Even if the Commission's tenancy, after 15th May 1936, was from year to year as found by the trial judge, it was not properly terminated by the notice dated 26th January 1938. This notice was completely ineffective and did not operate to terminate the tenancy on 15th May 1939. No proper notice to terminate the tenancy was proved in evidence in these proceedings. In earlier cases there was a tendency, if the notice was ambiguous, for the Court to try to give it a reasonable construction, but the later cases are clear that a bad notice is a nullity: *P. Phipps and Company (Northampton and Towcester Breweries), Limited v. Rogers*, [1925] 1 K.B. 14; *Hankey v. Clavering*, [1942] 2 K.B. 326. [LAIDLAW J.A.: Why must there be written notice? Does not the fact that the tenant went out of possession bring the tenancy to an end at the earliest possible date?]

The trial judge has found that the covenant to "keep the whole of the demised premises modern and up-to-date" was broken, but his interpretation of the obligation thereunder was too narrow. We ask for a reference upon proper principles and upon a proper interpretation of the covenant. [LAIDLAW J.A.: Do you contend that maintenance is synonymous with replacement?] As any part becomes obsolete, the obligation is to make it modern and bring it up to date; it is in fact the ordinary covenant to repair. [GILLANDERS J.A.: How far does the obligation go in maintaining the standard?] The trial judge has indicated his conception by illustrating the basis on which the Master should proceed, but he does not go far enough. [LAIDLAW J.A.: How can the Court lay down any guide for the Master in deciding what is modern and up to date?] See *Proudfoot v. Hart* (1890), 25 Q.B.D. 42; *Lurcott v. Wakely & Wheeler*, [1911] 1 K.B. 905 at 915. If the covenant to keep modern required a succession of replacements and repairs, then

the lessee was bound to make them. [LAIDLAW J.A.: If there is a covenant for perpetual renewal, then on what date does this covenant to repair become, and cease to be, operative?] It is a continuing obligation; damages should be assessed down to the date of the reference. We are damaged because the respondent is not keeping the station up as a modern plant, which it covenanted to do. An action for damages may be brought by the lessor against the lessee during the currency of the lease: *Henderson v. Thorn*, [1893] 2 Q.B. 164. [GILLANDERS J.A.: Did the respondent have any reversion to sell during the currency of the lease?] We still owned the fee in the property. [LAIDLAW J.A.: But what damages have you sustained except that you cannot make a sale? Would you not need to show that the breach of covenant caused damage? You received the rent—what difference did it make?] We are simply asking for the damages to which we are entitled, for breaches up to date: *Lurcott v. Wakely & Wheeler*, *supra*. If the station and equipment become obsolete, then one turns to the covenant, which stipulates that everything must be kept up to date. The next logical step is that some new device must be installed, in order that improvements may be made according to the rapid advance of the science of broadcasting. [LAIDLAW J.A.: The ultimate result would be that it would be only a matter of time until the subject-matter of the lease became entirely different.] The trial judge found as a fact that this covenant had been broken, and this finding is fully supported by the evidence. The trial judge should not have required the plaintiff, in any circumstances, to pay the costs of the reference. It should have its costs of the reference in any event.

John Jennings, K.C. (*F. W. Savignac* with him), for the defendant, respondent: The Court of Appeal has held that the respondent Corporation, which came into existence as of 2nd November 1936, is an emanation of the Crown: *Re The City of Toronto and The Canadian Broadcasting Corporation*, [1938] O.W.N. 507, affirming [1938] 4 D.L.R. 591. It has been held that the Corporation can be sued in the provincial courts by virtue of s. 4 of The Canadian Broadcasting Act, 1936, c. 24: *Gooderham & Worts Ltd. v. Canadian Broadcasting Corporation*, [1940] O.R. 130, [1939] 4 D.L.R. 241, reversing [1939] O.W.N. 273, [1939] 2 D.L.R. 654. An emanation of the Crown is

the Crown, and stands in the place of the Crown: *Rowland v. The Air Council* (1923), 39 T.L.R. 228, 455.

The provincial courts have no jurisdiction to entertain an action against the Crown in right of the Dominion, on a contract: The Exchequer Court Act, R.S.C. 1927, c. 34, ss. 18, 19. The Court of its own motion would refuse to hear an action, even if the objection had been neither pleaded nor argued: *Peccin v. Lonegan and T. & N.O. Railway Commission*, [1934] O.R. 701 at 707, [1934] 4 D.L.R. 776, 43 C.R.C. 199, and cases there cited. That case is also authority for the proposition that an interlocutory judgment, as in the earlier judgment in this action, cited above, is not binding as *res judicata*. The *Rowland* case dealt with the question whether an action of contract was maintainable against the Air Council; in England there is no equivalent of s. 18 of The Exchequer Court Act. [LAIDLAW J.A.: Wherever it has been the intention to give jurisdiction to the Exchequer Court, there has been an express provision to that effect.] Such a section as s. 4 of the 1936 Act does not give the subject a right to proceed against the Crown, except by petition of right: *Roper et al. v. Commissioners of His Majesty's Works and Public Buildings*, [1915] 1 K.B. 45; *MacKenzie-Kennedy v. Air Council*, [1927] 2 K.B. 517 at 528; see also The Canadian National Railways Act, R.S.C. 1927, c. 172, s. 33; 6 Halsbury, 2nd ed., p. 491, para. 603; *International Railway Company v. Niagara Parks Commission*, [1940] O.R. 33, [1939] 4 D.L.R. 340, 50 C.R.C. 168; *Michaud v. C.N.R. Co.*, 51 N.B.R. 220, 29 C.R.C. 362, [1924] 3 D.L.R. 1; The National Harbours Board Act, 1936 (Dom.), c. 42, s. 3(3), and 1938 amendment, c. 34.

As to the lease, Steel, as agent of the Commission, had no authority. The alleged agreement for a lease, before execution of the formal lease, does not meet the requirements of The Statute of Frauds, R.S.O. 1937, c. 146: Foa, Landlord and Tenant, 6th ed., p. 398; *Mayor, Aldermen, and Citizens of Oxford v. Crow*, [1893] 3 Ch. 535; *Newport Industrial Development Co. v. Heughan*, 62 O.L.R. 364 at 366, [1928] 3 D.L.R. 547. The Commission had no power to delegate its authority: *Re Petrie Manufacturing Co. Limited*, 24 O.W.N. 411, [1923] 4 D.L.R. 60, 4 C.B.R. 65; Palmer's Company Law, 17th ed., pp. 36-7; 2 C.E.D. (Ont.), pp. 471-2. [HENDERSON J.A.: We are all of the opinion that there was no binding contract until the lease was executed.]

It must be remembered that Parliament, in 1932-33, gave to the Commission powers which it had not theretofore possessed, and stipulated that certain things were not to be done without approval by order in council. Parliament put on its own agent a further limitation. This situation closely approximates the law of agency as well as the doctrine of *ultra vires*. The order in council authorized only a lease for a single term of three years, at a rent of \$12,000 per annum. The Crown was here limiting the expenditure of public funds; the expenditure so authorized was to be made out of moneys appropriated by Parliament for the purpose. The perpetual renewal clause is in effect a lease in perpetuity, and would impose a yearly obligation of \$12,000 on the public forever. The order in council gave no power to bind the country by such terms: *The Directors, &c., of The Ashbury Railway Carriage and Iron Company (Limited) v. Riche* (1875), L.R. 7 H.L. 653 at 672-3; *The Attorney-General et al. v. The Directors, &c., of the Great Eastern Railway Company* (1880), 5 App. Cas. 473 at 478-9, 486; *London County Council v. The Attorney-General et al.*, [1902] A.C. 165 at 167; *The President and Governors of the Magdalen Hospital v. Knotts et al.* (1879), 4 App. Cas. 324; *Sinclair v. Brougham et al.*, [1914] A.C. 398; *Bonanza Creek Gold Mining Company, Limited v. The King*, [1916] 1 A.C. 566 at 576, 577-8, 26 D.L.R. 273, 10 W.W.R. 391, 34 W.L.R. 117, 25 Que. K.B. 170; *Deuchar v. Gas Light and Coke Company*, [1924] 2 Ch. 426 at 431; *The Canadian Bank of Commerce v. The Cudworth Rural Telephone Company*, [1923] S.C.R. 618 at 627, [1923] 4 D.L.R. 16, [1923] 3 W.W.R. 458; *Palmer's Company Law*, 17th ed., p. 268. [LAIDLAW J.A.: Does the whole lease become *ultra vires* because of the renewal clause and the covenant for keeping up to date?] If there were only slight deviations from the order in council, it might be argued that the lease was divisible, but this lease goes so far beyond what was authorized that it is wholly invalid. A lease is *ultra vires* if a limitation is imposed on the exercise of a corporate power: *In re The General Provident Assurance Company (Limited)* (1869), 38 L.J. Ch. 320; *Wood v. The Queen* (1877), 7 S.C.R. 634 at 649; *Mayes v. The Queen* (1894), 23 S.C.R. 454; *The Queen v. Woodburn* (1898), 29 S.C.R. 112; *The King v. The Vancouver Lumber Company* (1913), 17 Ex. C.R. 329 at 331-2, 41 D.L.R. 617; *Commercial Cable Company v. Government of Newfoundland*, [1916] 2 A.C. 610 at 616.

As to the effect of exceeding the authority given by the order in council, see *The British American Fish Corporation, Limited v. The King* (1918), 18 Ex. C.R. 230 at 233, 44 D.L.R. 750; *National Dock and Dredging Corporation Limited v. The King*, [1929] Ex. C.R. 40 at 42. This latter case illustrates how narrowly an order in council must be construed. As to the effect of providing for appropriation of moneys by Parliament, see *Wood v. The Queen*, *supra*; *Mackay v. Attorney-General for British Columbia et al.*, [1922] 1 A.C. 457 at 460-1, 63 D.L.R. 171, [1922] 1 W.W.R. 982. [LAIDLAW J.A.: Could it be that the covenant to keep modern and up to date would be *ultra vires* if construed as the appellant contends, but *intra vires* if taken to mean that the premises were to be kept reasonably in repair?] Any covenant which is beyond the ambit of the order in council is *ultra vires*; the amount of the financial commitment provided for cannot be exceeded.

The covenant to keep modern, etc., means that the station must be kept in good operating condition. We have complied with the covenant in this sense. There is much evidence to this effect. The covenant cannot be extended to mean more than that the demised premises are to be kept in repair; we need not substitute anything new: *Royal Trust Company v. The King*, [1924] Ex. C.R. 121 at 124; *Lister v. Lane & Nesham*, [1893] 2 Q.B. 212 at 216.

There is a difference between the lease in its final form and as set out in the letters: *Pembery v. Lamdin*, [1940] 2 All E.R. 434 at 437.

Occupation under a void lease constitutes a tenancy at will. Here there was a deliberate election, in May 1936, by the lessor, and it chose to abandon the right to ask for a renewal. There may be a tenancy at will even when a fixed annual rent is paid: *Doe d. Dixie v. Davies* (1851), 7 Ex. 89, 155 E.R. 868; *Pegg et ux. v. Supreme Court of The Independent Order of Foresters et al.* (1901), 1 O.L.R. 97 at 101; *Hand v. Hall* (1877), 2 Ex. D. 318 at 320; *King v. Eversfield*, [1897] 2 K.B. 475.

The Corporation came into existence on 2nd November 1936. On 18th November the appellant asked if we would like to cancel the lease; it was anxious to avoid the perpetual renewal clause. If the lease itself is a binding document, that covenant is also binding. Mere overholding is not all that makes us tenants at will. One cannot have a tenancy from year to year

if the lessor cannot terminate it. If there is nothing done but overholding and the payment of rent, there is a presumption of a tenancy from year to year. That presumption has been rebutted here by the fact that a yearly tenancy can arise only under an implied contract. The lessor never agreed, and always maintained that we were bound for all time. In any event, we could not become yearly tenants, because no money was available except what might be appropriated by Parliament. Our continued occupation was under a mistaken idea that we were bound by the lease: *In re Northumberland Avenue Hotel Company* (1886), 33 Ch. D. 16.

If it is assumed that a tenancy from year to year was created, it must have been terminated, by the vacating of the premises and giving of notice on 14th March 1938, at the latest on 15th May 1939: *King Edward Hotel Company Limited v. Gooderham & Worts Limited*, unreported.

As to estoppel, there are divergent opinions in the Courts as to whether the Crown can be bound by estoppel: *The Attorney-General of Canada v. C. C. Fields & Company*, [1943] O.R. 120, [1943] 1 D.L.R. 434; Chitty, *Prerogatives of the Crown*, p. 347; Robertson, *Civil Proceedings*, p. 576; *Queen Victoria Niagara Falls Park Commissioners v. International Railway Co.*, 63 O.L.R. 49, [1928] 4 D.L.R. 755, 34 C.R.C. 428; *Ottawa Electric Railway Co. v. City of Ottawa*, [1934] O.W.N. 265 at 267. [HENDERSON J.A. referred to *Attorney-General v. The Prince of Wales v. Collom*, [1916] 2 K.B. 193.] The general principles of estoppel are set forth in *Marginson v. Blackburn Borough Council*, [1938] 2 All E.R. 539; *Foster v. Reaume*, 60 O.L.R. 63 at 70-1, [1927] 1 D.L.R. 1024; 13 Halsbury, 2nd ed., p. 409; Smith's *Leading Cases*, 13th ed., p. 678; *Broken Hill Proprietary Company, Limited v. Municipal Council of Broken Hill*, [1926] A.C. 94 at 100. The *Broken Hill* case is the exact opposite of *Hoystead et al. v. Commissioner of Taxation*, [1926] A.C. 155. Both are considered in *New Brunswick Railway Company v. British and French Trust Corporation, Limited*, [1939] A.C. 1.

C. F. H. Carson, K.C., in reply: The respondent's obligation to renew did not arise until the expiration of the first three-year term, on 15th May 1936. At that time, the legislation requiring approval by order in council was no longer in force, and the legislation of 1932, without amendment, again applied. By 1935

(Dom.), c. 65, it was expressly provided that on and after 1st April 1936, the 1932 Act was to be read as if the intervening amendments had never been enacted. The capacity of the Commission at that time to acquire private stations by lease, without the approval of the Governor in Council, was therefore beyond question.

The validity of the lease is *res judicata* by the judgment in the *King Edward Hotel* case: *Hoystead et al. v. Commissioner of Taxation, supra*; *New Brunswick Railway Company v. British and French Trust Corporation, Limited, supra*. The *New Brunswick Railway* case did not throw doubt on the *Hoystead* case. [LAIDLAW J.A.: One of the questions we are now asked to determine is the validity of the renewal clause, and there was no adjudication on this point.] The judgment was to the effect that there was a valid lease. [LAIDLAW J.A.: Does that involve a decision that all the clauses were valid and effective?] The lease must be taken as a whole; it cannot be split up.

The learned trial judge has found that there was a breach of the covenant to keep modern, but his interpretation of the obligation thereunder is too narrow. The lessee's duty under this clause was not performed by merely patching up, when much better and more modern equipment could be obtained. [HENDERSON J.A.: This covenant differs in its essence from any covenant in any of the cases to which reference has been made. If this covenant is bad, is the entire lease bad, or is it divisible?] The covenants impose separate obligations. There is a discussion of a similar covenant in *Lurcott v. Wakely & Wheeler*, [1911] 1 K.B. 905. The obligation is not one which arises suddenly; it is to be performed from time to time. The appellant was entitled to receive back a modern, up to date station.

We ask for a reference upon proper principles and upon a proper interpretation of the covenant. The trial proceeded upon the footing that there would be a reference, and the learned judge did not have before him the evidence necessary for the assessment of damages. He should not have put forward an "estimate" of the damages, even in the terms he used: *Proudfoot v. Hart* (1890), 25 Q.B.D. 42.

The cases cited by the respondent on the doctrine of *ultra vires* are all cases where companies have acted beyond their capacities. Where a company is a statutory one, its powers are

clearly defined by the statute: see *Mayes v. The Queen* (1894), 23 S.C.R. 454; *Commercial Cable Company v. Government of Newfoundland*, [1916] 2 A.C. 610; *The British American Fish Corporation, Limited v. The King* (1918), 18 Ex. C.R. 230, 44 D.L.R. 750.

No proper notice to terminate a tenancy from year to year was proved. [HENDERSON J.A.: The respondent says that in law notice need not be in writing, and that you were given unequivocal notice that the lessee was going out of occupation.] [LAIDLAW J.A.: When a yearly tenancy is presumed by law, is that tenancy exhausted at the end of the year, so that a new tenancy is to be presumed each year, or does it, once presumed, carry on forever?] The presumption is that the tenancy continues from year to year.

As to *res judicata* and estoppel, I refer to *Fonesca and Schultz v. The Attorney General of Canada* (1889), 17 S.C.R. 612 at 619; 13 Halsbury, 2nd ed., p. 426, para. 479; 49 Law Quarterly Review (1933), 511.

W. Judson, in reply: The respondent assumes that its predecessor contracted on behalf of the Crown, and therefore claims to be within the jurisdiction of the Exchequer Court, under s. 18 of The Exchequer Court Act, R.S.C. 1927, c. 34. But this is not the fact; the Commission contracted on its own behalf, and for no other person; the contract here in question was not made by or on behalf of the Crown. The judgment of the Court of Appeal in the earlier proceedings in this case is conclusive on this matter: see [1940] O.R. 130, [1939] 4 D.L.R. 241, and the discussion of that judgment in *International Railway Company v. Niagara Parks Commission*, [1940] O.R. 33 at 48, [1939] 4 D.L.R. 340, 50 C.R.T.C. 168.

Cur. adv. vult.

9th July 1943. HENDERSON J.A.:—This is an appeal from the judgment of Greene J., dated 1st September 1942, and the Court had the pleasure of listening to very able arguments of counsel and to a presentation of the case in all its aspects.

The record contains the reasons for judgment of the learned trial judge, who has given us the benefit of an admirable review of the facts and of the issues involved, and with whose conclusions and his reasons therefor I, in the main, agree. I shall hereafter indicate some minor points on which, with great

respect, I am unable to agree with the conclusions of the learned trial judge.

The formal judgment awards to the plaintiff the sum of \$12,000, and directs that the plaintiff do recover from the defendant damages for breach of the covenant in the lease mentioned in the pleadings, to keep the whole of the demised premises modern and up-to-date, and in good repair and operating condition, with a reference to the Master to determine the amount of such damages.

I need not repeat here the history of the transactions, as the reasons for the judgment of the learned trial judge contain a full, and, in my opinion, correct and concise statement of them.

We intimated to counsel in the course of the argument that we were all of opinion that no agreement for a lease was concluded, and that no contract existed between the parties until the execution of the lease in question, which was on 16th June 1933, although the indenture of lease on its face is made as of the 15th day of May 1933. In this respect we are in agreement with the learned trial judge.

It follows that the provisions of c. 35 of the Statutes of 23-24 Geo. V. (1933), *An Act to amend The Canadian Radio Broadcasting Act, 1932*, which was assented to on 23rd May 1933, were in force when the lease was made, and that the powers of the respondent were subject to its provisions.

By s. 2 of this statute, the respondent's predecessor, the Commission, was empowered, subject to the approval of the Governor in Council, to acquire existing private stations either by lease or by purchase.

An order in council was in fact obtained by which the Commission was given authority to lease station CKGW from Messrs. Gooderham and Worts, Toronto, for a period of three years at a price of \$12,000 per annum, this expenditure to be made out of moneys appropriated by Parliament for the use of the Commission. I agree with the finding of the learned trial judge that this is sufficient to confer authority on the Commission to enter into a lease for a period of three years, at a rental of \$12,000 per annum, and to enable the Commission to agree to the usual and ordinary covenants found in a lease, which, under ordinary circumstances, would be the usual statutory covenants. I am unable to agree with the contention of Mr. Jennings that the order in council is to be read as limiting to the sum of \$12,000

the entire expenditure which the Commission was authorized to make.

The lease actually entered into contains a covenant for successive renewals for three-year periods in perpetuity, and provides that each successive lease shall contain the same covenants as the original lease, including a covenant for renewal and the option to purchase.

The original lease provides that the lessor shall grant, and that the lessee shall accept, renewals in accordance with the foregoing at the same rental per annum, with the proviso that if no such new lease shall be entered into, the present or then existing lease, as the case may be, and all the terms and conditions thereof, shall continue until terminated by the lessor upon one month's notice in writing to the lessee. The lease also contains a provision that the lessee may purchase the demised premises at any time during the currency of the lease or any renewal thereof.

The learned trial judge was of opinion that the lease was valid as to the original term of three years, but upon the footing that it was a perpetual lease, held it void as to the renewals. With great respect I am unable to agree with this conclusion, for the reason that the lease is not a perpetual lease, but is a lease which provides for successive renewals in perpetuity, and is therefore a valid lease. I am, however, in agreement with the finding of the learned trial judge that the provisions for renewal, and certain other provisions to which I shall refer, were beyond the authority of the Order in Council and therefore beyond the power of the Commission, and for that reason void. I am also in agreement with the learned trial judge that this does not void the lease as a whole, but only as to those of its provisions which are beyond the competence of the Commission.

The lease contains a covenant as follows:

"AND the Lessee covenants with the Lessor to keep the whole of the demised premises modern and up-to-date and in good repair and operating condition."

This covenant goes somewhat beyond the usual covenant as to repair in that it requires the lessee to keep "the whole of the demised premises modern and up-to-date", and I have been in some doubt as to whether, in this respect, it is not beyond the authority either expressly or impliedly given to the Commission. On consideration, however, and having in view the

regulations enacted by the Commission and approved by the Governor in Council, and which were to come into force shortly after the commencement of the lease, I think it can fairly be said that the covenant, properly construed, is within the authority of the Commission. In my opinion the construction to be placed upon this covenant is to keep in mind that the covenant is not to erect or construct a modern and up-to-date station, but is to keep the whole of the demised premises, *viz.*, the station and the studio and offices which are part and parcel of same, modern and up-to-date. It is the thing demised that is to be kept modern and up-to-date, and this must be construed having regard to the kind of station and other premises which were demised. For instance, it is said that the site is unsuitable for a modern high powered station. It cannot be contended successfully, in my opinion, that this obligated the lessee to find an improved site or to substitute a site for that already in being. It is also said in evidence that it would not be feasible to convert this station into a modern high powered station as, for instance, it is said that good engineering practice requires a signal strength in the centre of Toronto of twenty-five millivolts, whereas in fact this station is capable of less than two millivolts.

It is these considerations which, in my opinion, control the construction of the covenant, and the obligations of the lessee are to be construed as being obligations to keep the whole of the demised premises modern and up-to-date, in so far as the thing demised is capable of being kept modern and up-to-date.

The learned judge has found that this covenant has not been performed, and the trial proceeded upon the footing that if the plaintiff were found entitled to damages, there would be a reference to the Master to ascertain the same. I think the matter should be left to the Master without any limitations, except to the extent that I have indicated as to the construction of the covenant.

The learned trial judge, in this connection, makes, as he says, an estimate of the damages at \$25,000 "with great diffidence and in the hope that this litigation may be terminated", and gave to each party a right to elect before the issue of the formal judgment as to whether such reference were desired or not. The plaintiff elected to take a reference, but inasmuch as the trial had proceeded upon the footing that there would be a

reference, I think, with great respect, the learned trial judge erred in endeavouring to estimate the damages, evidence not having been offered as to the extent or amount of the damages by reason of the footing upon which the trial proceeded. I think, therefore, that the Master should be at large upon the reference, and that the plaintiff should not be put upon terms to pay the costs of the reference, if it should not recover in damages more than \$25,000, and that the formal judgment should be amended accordingly.

It was strongly urged by Mr. Jennings that the defendant, being an emanation of the Crown, is not bound by the doctrine of *res judicata*, and is not subject to be bound by equitable estoppel. In my opinion the parties are precluded by the decision of this Court in this case in the early history of the litigation, reported in [1940] O.R. 130, [1939] 4 D.L.R. 241. Mr. Jennings argued that this, being an interlocutory judgment, is not binding upon us, but I think this Court is also bound by this judgment, and in any event, whether that be so or not, I am in agreement with it.

I entirely agree with the conclusions of the learned trial judge that the lease being valid as to the original three-year term, and the lessee having continued in possession after the expiration of that term, and having paid rent, the relation between the parties became that of a tenancy from year to year.

We were referred in argument to the decision of this Court in the action of *The King Edward Hotel Company Limited v. Gooderham & Worts, Limited, and The Canadian Radio Broadcasting Commission (Third Party)*, unreported, and to the following passage from the judgment of the learned trial judge:

"Following the judgment of the Court of Appeal in *The King Edward Hotel Company v. Gooderham & Worts, Limited, and The Canadian Radio Broadcasting Commission (Third Party)*, unreported, I am of the opinion that the notice, together with abandonment of possession, did operate to terminate the tenancy on the first date on which it could be properly terminated, namely 15th May 1939", and it was said that this Court had decided that a notice to quit, which was bad for the date for which it was given, was good for a subsequent date. I desire to correct such an impression, because I am of opinion that a notice to quit, which is bad, cannot of itself be effective to terminate a tenancy at a subsequent date. I agree, however, with the argu-

ment of Mr. Jennings that there is no law which requires a notice to quit to be in writing, and that in the case at bar, the lessee having informed the lessor of its intention to quit the demised premises, and having effected the same on 14th March 1938, and having tendered the keys, the lease was thereby terminated on 15th May 1939.

For these reasons I am of opinion that the judgment in the Court below should be amended as to clause 5 thereof so as to read:

“AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the costs of the said reference do abide the result thereof.” *

I think that the defendant should have the costs of the appeal, and that the costs of the reference to the learned Master should abide the result of the reference.

The defendant cross-appealed and asked that the judgment be varied and be entered for the defendant, dismissing the plaintiff's action with costs. In my opinion the cross-appeal fails and should be dismissed with costs.

GILLANDERS J.A. agrees with HENDERSON J.A.

LAILAW J.A.:—This is an appeal by the plaintiff to vary a judgment of Greene J., dated the 1st day of September 1942. The defendant delivered a notice of cross-appeal and also seeks to vary the judgment.

There are four main questions to be determined:

(1) Did the appellant and the Canadian Broadcasting Commission make a valid lease or agreement for lease of premises owned by the appellant?

(2) Were certain covenants on the part of the Canadian Radio Broadcasting Commission within the powers possessed by it?

* NOTE: On 21st September 1943, on a motion by the appellant to vary the minutes of judgment, the same Court unanimously ordered that clause 5 of the formal judgment, instead of reading as above, should read:

“AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the costs of the said reference be paid by the Defendant to the Plaintiff in any event, forthwith after taxation thereof.”

(3) What is the proper construction to be put on a covenant of the lessee "to keep the whole of the demised premises modern and up-to-date and in good repair and operating condition"?

(4) If a covenant between the parties in respect of renewal of the lease was not within the powers of the Canadian Radio Broadcasting Commission, in what relationship did the owner and the occupant of the premises stand upon the expiration of the period stated in the lease?

The Canadian Radio Broadcasting Commission (hereinafter referred to as "the Commission") was constituted by an Act of the Parliament of Canada, The Canadian Radio Broadcasting Act, 1932, c. 51. It consisted of a chairman, a vice-chairman and a third commissioner, and was declared to be "a body corporate having capacity to contract and to sue and be sued in the name of the Commission." It was given power, for the purposes of the Act, "to acquire, hold and dispose of real and personal property." See s. 5. Also, by s. 9 it is provided as follows:

"The Commission shall have power to carry on the business of broadcasting in Canada and, without restricting the generality of the foregoing, may:

.....
 "(b) acquire existing private stations either by lease or, subject to the approval of Parliament, by purchase;

....."

By c. 35 of the statutes of 1933, s. 9(b), as above quoted, was repealed, and the following paragraph was substituted therefor:

"(b) Subject to the approval of the Governor in Council, acquire existing private stations either by lease or by purchase;"

By s. 4 of the same statute, it is provided:

"This Act shall expire on the thirtieth day of April, 1934."

The Act was re-enacted in 1934 (c. 60) and in s. 4 as quoted the year 1935 was substituted for 1934.

In 1935 the Act was again re-enacted by a further Act (c. 24), assented to 17th April 1935, except that in s. 4 thereof the thirtieth day of June 1935 was substituted for the thirtieth day of April 1935. Subsequently in the same year, by an Act (c. 65) assented to 5th July 1935, it was provided, *inter alia*, that:

“(1) The provisions of sections one, two and three of chapter thirty-five of the statutes of 1932-33 shall be deemed always to have been and hereafter they shall be, operative and in force only until the thirty-first day of March, 1936.”

(2) Section 4 and the amendments thereof “are wholly repealed.”

“(3) On and after the first day of April, 1936, chapter fifty-one of the statutes of 1932 shall be read as if chapter thirty-five of the statutes of 1932-33 and chapter sixty of the statutes of 1934 and chapter twenty-four of the statutes of 1935 had, respectively, never been enacted.”

By The Canadian Broadcasting Act, 1936, c. 24, assented to 23rd June 1936, there was created a corporation to be known as the Canadian Broadcasting Corporation (hereinafter referred to as “the Corporation”). It was given power, for the purpose of carrying on a national broadcasting service within the Dominion of Canada, to “acquire private stations either by lease or, subject to the approval of the Governor in Council, by purchase” (s. 8(n)). S. 10 may be referred to and now quoted as follows:

“Notwithstanding anything contained in this Act, the Corporation shall not, unless the approval of the Governor in Council has first been obtained:—

“(a) enter into any agreement involving any expenditure in excess of ten thousand dollars;”

.

And by s. 25 it was expressly provided:

“The Corporation shall, from the date of the coming into force of this Act, take possession of all property and assets and assume all the obligations and liabilities of the Canadian Radio Broadcasting Commission.”

By a proclamation dated the 10th day of September 1936, it was declared and directed that the Act “shall come into force and have effect upon, from and after the second day of November in the year of Our Lord one thousand nine hundred and thirty-six.”

Negotiations with a view to a lease by the Commission of premises owned and used by the plaintiff as a radio station, known as CKGW, were commenced about the first of May 1933. Under date 16th May 1933, H. C. Hatch, acting on behalf of the plaintiff, set out in a letter to the Commission, addressed “Atten-

tion Lieut. Col. W. Arthur Steel, Commissioner," certain terms, which, he said: "I am prepared to recommend to our Directors" and "which I think will be acceptable to them." The last paragraph of this letter reads:

"If you will signify in the manner below indicated the agreement of the Commission to the terms above outlined, I will present this letter as an offer to our Board of Directors at their next Meeting which will be held on Friday, the 19th inst. for acceptance and will have the lease prepared."

That letter bears the notation and signature "Agreed, May 16, 1933. W. Arthur Steel, Commissioner, Canadian Radio Broadcasting Commission." It is alleged that this letter contained the terms of a proposal made on behalf of the appellant, and that it was accepted by W. A. Steel on behalf of the Commission. Counsel for the appellant argues that a binding agreement to lease was thereby made between the appellant and the Commission. I do not agree. Neither H. C. Hatch, acting on behalf of the appellant, nor W. A. Steel, on behalf of the Commission, is shown to have had the necessary authority to make a contract binding on the respective corporations. I do not overlook a statement made by the chairman of the Commission to Mr. Hatch in a letter dated 12th May 1933, that "Colonel Steel . . . has authority to close an agreement." That statement does not confer the necessary authority on Colonel Steel. Such authority could only be given to Colonel Steel by a corporate act of the Commission, and no such corporate act is disclosed by the evidence. Likewise, no sufficient authority in law from the appellant to Mr. Hatch to enable him to make a binding contract on its behalf has been shown. Moreover, I think that the last paragraph of the letter from Mr. Hatch to the Commission, as quoted above, must be interpreted to mean this—if you agree with the terms outlined and signify your agreement to them I shall treat the letter as an offer from the Commission to the board of directors of Gooderham & Worts Limited. Such a statement and attitude on the part of Mr. Hatch does not make the contents of the letter an offer binding in law on the Commission. There was no subsequent corporate act of the Commission to constitute such an offer. I think, too, that the parties both contemplated ultimate expression of the proposed arrangement by an instrument in writing to be formally executed by both corporations, and that no relationship in law would be created unless and until

that was done. See *Hussey v. Horne-Payne et ux.* (1879), 4 App. Cas. 311; *Queen's College v. Jayne* (1905), 10 O.L.R. 319. Finally, I agree with the learned trial judge that the arrangement disclosed in the letter of 16th May is not binding on the defendant because of a later and substantially different agreement between the parties. During the hearing of the appeal the Court announced the unanimous opinion of the members that the argument of appellant's counsel on this point must fail, and that no binding agreement to lease was made in the manner alleged.

Following a report from the Commission to the Minister of Marine, the committee of the Privy Council concurred in a recommendation "that the Radio Commission be given authority to lease station CKGW from Messrs. Gooderham and Worts, Toronto, for a period of three years at a price of \$12,000 per annum. This expenditure to be made out of monies appropriated by Parliament for the use of the Commission." Approval thereof was given by His Excellency the Governor-General on 27th May 1933. The Commission took possession of the premises on 29th May 1933, and subsequently, on 16th June 1933, the Commission sent to the appellant two copies of a lease "signed and sealed" by the Commission. The indenture is made "as of the Fifteenth day of May, one thousand nine hundred and thirty-three". The instrument describes by metes and bounds two parcels of land: includes the right, title and interest of the lessor in a certain unopened road allowance; and "all plant and equipment owned by the Lessor and used by it in connection with the operation of Radio Broadcasting Station CKGW". It is stated that "the whole of the said property" is "referred to as the 'demised premises'."

I quote the terms of the lease, as follows:—

"2. TO HAVE AND TO HOLD the said demised premises for and during the term of three years to be computed from the 15th day of May, 1933, and thenceforth next ensuing, and fully to be complete and ended on the 15th day of May, 1936; yielding and paying therefor, yearly and every year, during the said term unto the Lessor, its successors and assigns, the sum of TWELVE THOUSAND DOLLARS (\$12,000) of lawful money of Canada, to be paid in advance in equal quarterly instalments of THREE THOUSAND DOLLARS (\$3,000) each on the 15th days of May, August, November and February in each year during the said term."

I also quote the following two covenants:—

“4. AND the Lessee covenants with the Lessor to keep the whole of the demised premises modern and up-to-date and in good repair and operating condition.”

“12. AND ALSO that at the expiration of the term hereby granted and of every succeeding term of three years to be granted by the Lessor to the Lessee as hereinafter provided the Lessor will at the costs and charges of the Lessee grant a new lease for a further term of three years from the determination of the present or then existing lease at the same rental per annum as provided for by the present lease irrespective of any buildings, erections and improvements erected or made thereon or therein by the Lessee and the Lessee covenants and agrees to accept such new lease and to execute the same, and if no such new lease be entered into as aforesaid the present or then existing lease, as the case may be, and all the terms and conditions thereof shall continue until terminated by the Lessor upon one month's notice in writing to the Lessee. Provided, however, that the Lessor shall not be under any obligation to grant a new lease unless the Lessee shall have fully paid, observed and performed all rents, covenants and agreements contained in the present or then existing lease, as the case may be.”

In October 1933, the Commission vacated certain premises in the King Edward Hotel, Toronto, theretofore used in connection with broadcasting station CKGW and occupied under the provisions of a lease made between the appellant and The King Edward Hotel Company Limited. An action was commenced on 12th June 1934, by The King Edward Hotel Company Limited as plaintiff against the appellant as defendant, for rent and for damages for alleged breach of covenant. The Commission was joined in the proceedings as a third party. Judgment after trial was given by Kerwin J. on 10th June 1935, whereby the defendant was held liable to the plaintiff and entitled to recover the amount of damages and costs awarded against it from the Commission. After appeal the judgment was varied by an order of the Court of Appeal dated the 29th day of October 1935, and the Commission was held liable for the sum of \$5,200 (and costs) recovered by the King Edward Hotel Company Limited from the present appellant.

After the expiration of the period of three years, as provided in the indenture of lease executed by the appellant and

the Commission, *i.e.*, on and after 15th May 1936, the Commission, and subsequently (after the Act under which it was incorporated came into effect on 2nd November 1936) the Corporation, continued in possession of the demised premises and paid rent as provided therein. Broadcasting was carried on by the Corporation from the premises at Bowmanville until the latter part of December 1937. The staff was then moved to a new location, at Hornby, Ontario, selected by the Corporation and intended to be used by it thereafter as a site for carrying on its business of broadcasting.

Under date 26th January 1938, the general manager of the Corporation sent to the appellant a letter which reads as follows:—

“Since the completion, and initiation into broadcasting service, of our new high power Transmitter Station at Hornby, Ontario, the avenues of activities of the Corporation have been considerably changed; and the Corporation will not further require the premises covered by the indenture of lease, dated May 15th, 1933, between your Company and the Canadian Radio Broadcasting Commission, from and after May 15th, 1938.

“I have accordingly to give notice of termination of the lease in question to take effect as from May 15th next, and would you be good enough to acknowledge receipt of this advice and oblige.”

On the 30th April 1938, the writ of summons was issued in this action. The plaintiff claims:—

“(1) A Declaration that the said Principal Lease and/or the said agreement is valid and subsisting and that the Defendant is bound to observe and perform the obligations of the Commission thereunder, and an Order for specific performance of the Principal Lease and/or the said agreement.

“(2) Further or alternatively, the sum of \$250,000.00 being the present value of the rent payable in perpetuity under the Principal Lease and/or the said agreement.

“(3) Alternatively, a Declaration that the Defendant is a tenant to the Plaintiff under a yearly tenancy expiring on the 15th day of May in each year on all the terms of the Principal Lease, or alternatively on the terms of the Principal Lease insofar as the same are applicable.

“(4) In the further alternative, the sum of \$250,000.00, or such other sum as to this Honourable Court may seem proper,

for the use and occupation of the demised premises from the 15th day of May, 1933, to the 15th day of May, 1938.

“(5) Further or alternatively, damages for the conversion of the property mentioned in paragraph 10 hereof.

“(6) Further or alternatively, damages in the sum of \$127,-090.00 or such other sum as this Honourable Court may deem proper for failure to keep the demised premises modern and up-to-date and in good repair and operating condition.

“(7) Such further and other relief as to this Honourable Court may seem just.”

During trial counsel for the plaintiff consented that the claim for damages for conversion as quoted above in clause 5 of the prayer and para. 10 of the statement of claim, as referred to therein, be struck out, and an order of the Court was made accordingly.

The respondent submits in its statement of defence, *inter alia*, “that it is an emanation of the Crown and as such is the Crown and is entitled to all the prerogative rights and immunities of the Crown”; “that it may be proceeded against only by way of Petition of Right”; that exclusive jurisdiction to entertain claims arising out of the alleged contract rests in the Exchequer Court of Canada; that the lessee had no power or authority to enter into the indenture of lease; that “The Commission and this Defendant were each of them without legal capacity to obligate either the Commission or this Defendant beyond a period of three years, or for any liability in excess of \$12,000 per annum for a period not in excess of three years”, or in any way beyond the terms of the order in council referred to, “or beyond the terms of its Act of incorporation as amended”; that “The said Lessee and the defendant were at all relevant times merely tenants at will of the lands and premises described in the said Indenture of Lease and this Defendant effectually terminated the said tenancy at will as of the 15th day of May, 1938”; that the said Indenture of Lease is a nullity; that neither the covenant to keep “the whole of the demised premises modern and up-to-date and in good repair and operating condition” nor the covenant with respect to renewal is binding upon it. The respondent further submits that in any event the premises described in the said indenture of lease were at all times kept “modern and up-to-date and in good repair and operating con-

dition", and were delivered back to the plaintiff in such condition.

The learned trial judge held, *inter alia*, that: (1) "... capacity having been given to lease a certain station subject to certain restrictions, the Commission then had discretion to settle the other terms in a manner reasonably in accord with leasing practice;"

(2) "The covenant for perpetual renewal or purchase is plainly void as no perpetual lease is valid and the Commission did not have authority to purchase without the approval of the Governor in Council and it had no such approval;"

(3) "... the lease may be viewed as a valid document eliminating the invalid clause."

(4) "... the defendant ... is estopped from denying the validity of the lease in its entirety, subject to its right to attack any particular clause as void;"

(5) The conduct of the defendant raises a presumption of a tenancy from year to year after 15th May 1936, and that presumption has not been rebutted.

(6) "... creation of a tenancy from year to year was not beyond the power of the Commission" and "the obligation of the Commission became the obligation of the present defendant."

(7) The notice under date of 26th January 1938, "together with abandonment of possession, did operate to terminate the tenancy on the first date on which it could be properly terminated, namely, the 15th day of May, 1939."

(8) "The plaintiff is consequently entitled to rent at \$12,000 per annum up to that date."

And in respect of the plaintiff's claim for damages for alleged breach of covenant in clause 4 of the lease, the learned trial judge held:

(9) That the equipment used at the studio in the King Edward Hotel formed part of the "demised premises" covered by the lease.

(10) The words "keep modern and up-to-date" "carry an obligation to make all expenditures within reason to keep the existing plant abreast with the broadcasting art, but not to substitute a new plant for the old."

(11) Such a covenant is not beyond the implied powers of the Commission.

(12) The question whether the defendant can be proceeded against only by petition of right was not before him as "the Court of Appeal has decided that the defendant may be sued in this Court."

The learned trial judge found from the weight of evidence that "the Commission and its successor, the defendant Corporation, did not live up to the covenant 'to keep the whole of the demised premises modern and up-to-date'." He assessed the plaintiff's damages for breach of covenant at \$25,000, with the right to either party to have a reference in place of such assessment and in such event the damages to be ascertained as of 15th May 1939. The plaintiff elected to have a reference, and judgment was entered accordingly. The judgment provides that "the costs of the said reference be to the Plaintiff if the amount so found due thereon exceeds \$25,000, and to the Defendant if the amount so found due be \$25,000 or a lesser amount. . . ."

I first consider the right of the plaintiff to maintain this action and the jurisdiction of the Court to entertain it. This question has previously been determined and the Court of Appeal, composed of Riddell, McTague and Gillanders JJ.A., on 10th October 1939, decided that the Court had jurisdiction in respect to the matters in issue between the parties. It was held that the defendant had power to make contracts throughout Canada, and that the reasonable inference was that it was contemplated that it could be sued in a forum where the contract could be made, just as any other party to a contract could be sued: *Gooderham & Worts Ltd. v. Canadian Broadcasting Corporation*, [1940] O.R. 130, [1939] 4 D.L.R. 241. See also *International Railway Company v. Niagara Parks Commission*, [1940] O.R. 33 at 48, [1939] 4 D.L.R. 340, 50 C.R.C. 168, reversed [1941] A.C. 328, [1941] 3 D.L.R. 385, [1941] 2 W.W.R. 338, 53 C.R.C. 1.

Counsel for respondent relied on, and urged to the Court, the judgment in *Rowland v. The Air Council* (1923), 39 T.L.R. 228, 455; also *Rowland and Kennedy v. Air Council* (1925), 41 T.L.R. 545, affirmed (1927), 43 T.L.R. 717. It was made plain that the Air Council, which was established to administer matters relating to the Air Force and the defence of the realm by air, was in the fullest sense the Crown. It was said, by Russell J., at p. 229 (39 T.L.R.): "the plaintiff could not by action against this Government Department obtain a declaratory judgment". It was pointed out that the Air Council was not an incorporated

body, but consisted of individuals; that provision was made for transfer to it of such property rights and liabilities of the Admiralty or the Army Council, or the Secretary of State for War, as might be agreed; that the particular section (s. 10) of the Act under consideration "must be considered without reference to arguments addressed to the Courts in respect of other Acts of Parliament", and that the section was particularly directed to the matter of a legal description of a shifting body by an apt title to include all individuals who from time to time composed it. Those cases are thus distinguishable from the present one. I have also read the following cases referred to by counsel for the respondent: *Peccin v. Lonegan and T. & N.O. Railway Commission*, [1934] O.R. 701, [1934] 4 D.L.R. 776, 43 C.R.C. 199; *Re The City of Toronto and The Canadian Broadcasting Corporation*, [1938] O.W.N. 507, [1938] 4 D.L.R. 591, 764 (*sub nom. Re Canadian Broadcasting Corp. Assessment*); *MacKenzie-Kennedy v. Air Council*, [1927] 2 K.B. 517; also *Gillegghan v. Minister of Health*, [1932] 1 Ch. 86.

I examine now the question, "Did the appellant and the Commission make a valid lease or agreement for lease of premises owned by the appellant?" Counsel for the appellant argues:

(1) That the Commission had capacity, without an order in council, to make the lease in question; that this capacity is found in the broad powers conferred upon it by s. 5 and the introductory part of s. 9 of the 1932 Act (c. 51), which were not the subject of amendment by the Act of 1933 (c. 35).

(2) That even if an order in council was necessary as a result of the 1933 amendment, the order in council dated 27th May 1933 was sufficient; the 1933 amendment did not require that a specific lease or that the terms and conditions of a lease should be approved by order in council; the order in council did not purport to approve a specific lease; it approved the making of a lease for three years at a certain rental, and the terms and conditions of the lease were for the Commission and the plaintiff.

The respondent contends that the lease is beyond the ambit of the order in council in the following particulars:

- (a) The addition of plant and equipment.
- (b) Obligations exceeding the sum of \$12,000 per annum.
- (c) The unusual provisions as to insurance.
- (d) The covenant to keep modern and up-to-date.

(e) The provision for compulsory renewal by the Commission in perpetuity.

(f) The indemnity in respect of certain contracts.

I cannot agree that the provisions contained in s. 5 and the introductory part of s. 9 of the Act of 1932 are sufficient to empower the respondent to make the lease in question. S. 5 provides generally that "The Commission shall have power, for the purposes of this Act, to acquire, hold and dispose of real and personal property," and by s. 9 it "shall have power to carry on the business of broadcasting in Canada." But it is made abundantly clear by the amendment in 1933 (c. 35) that the exercise of such general powers is expressly limited in the particular matter of acquisition of "existing private stations either by lease or by purchase." This limitation cannot be disregarded, or permitted to be nullified by preceding words of general description. On the contrary the intention, as appears from the legislation, is plain and must be given full effect. In the absence of approval by the Governor in Council, the Commission could not acquire an existing station by lease from the appellant. Such approval was a condition precedent to a valid lease: *The Queen v. Woodburn* (1898), 29 S.C.R. 112; *The King v. The Vancouver Lumber Company* (1913), 17 Ex. C.R. 329 at 331, 41 D.L.R. 617, affirmed, 50 D.L.R. 6, [1920] 1 W.W.R. 255; *Pacific Coast Coal Mines, Limited v. Arbuthnot et al.*, [1917] A.C. 607, 36 D.L.R. 564, [1917] 3 W.W.R. 762. But the statute does not define the quality or extent of the approval necessary to enable the Commission to enter into a proposed transaction. I think approval of various kinds might be given, *viz.*:

(1) to acquire an existing station on such terms and conditions as the Commission might in its discretion deem advisable, or simply to acquire the property without specifying any terms or conditions; or

(2) to acquire such property on terms and conditions submitted in detail by the Commission, either in the form of draft lease or otherwise; or

(3) to acquire such property, stipulating the main terms and conditions only.

If the approval were general and unlimited as first above indicated, the Commission would be free and have the power to agree on such terms as it might deem proper and advisable,

subject only to any other statutory limitation on the exercise of its power.

In the second class of approval above mentioned, the Commission could not depart in any material way from the terms and conditions approved by the Governor in Council. In the third class, *viz.*, where the main terms and conditions of a proposed lease have received express approval, the Commission is no doubt free without further authority to settle and agree upon all incidental and usual details of such a transaction. But it cannot by virtue of such authority extend the approval to enable it substantially to vary or add to its obligation in the undertaking. Any such variation or addition would be *ultra vires* and, in my opinion, an act which in law would be a nullity. But the mere addition of a void clause in a lease does not of itself make the whole transaction null and void. It is a question for the court to determine whether in any particular case the invalid clause or clauses can be properly eliminated and the remaining clauses held to be a valid document. *The King v. The Vancouver Lumber Company, supra*; *The British American Fish Corporation, Limited v. The King* (1918), 18 Ex. C.R. 230, 44 D.L.R. 750; *National Dock and Dredging Corporation Limited v. The King*, [1929] Ex. C.R. 40.

The order in council dated 27th May 1933, gives authority "to lease station CKGW from Messrs. Gooderham and Worts, Toronto, for a period of three years at a price of \$12,000 per annum. This expenditure to be made out of moneys appropriated by Parliament for the use of the Commission." The lease entered into by the Commission was made for a period of three years at a rental of \$12,000 per annum, and those terms, with all usual and incidental covenants, are severable from that part of the lease relating to renewal. Moreover, the appropriation by Parliament of moneys for the use of the Commission was not a condition precedent to the exercise by the Commission of the authority conferred by the order. Such moneys to meet obligations undertaken by the Commission could be appropriated by Parliament at a later time or times as might be necessary. It was argued by counsel for the respondent that the word "price" as used in the order in council must be read to limit the expenditure by the Commission to \$12,000 per annum for rental and all other obligations under the lease. I do not agree. I think the word "price" as used in the order means "rental". I hold

therefore that the appellant and the Commission made a valid lease for a period of three years at a rental of \$12,000 per annum.

Is the provision for renewal of the lease, as contained in clause 12, within the power possessed by the Commission? At the hearing of the appeal counsel agreed that if the clause was valid, the intention to provide for perpetual renewal was sufficiently expressed. But it is quite clear to me that there is no authority given by the order in council to the Commission to assume the obligation contained in this part of the lease. It is a substantial addition to the terms expressly approved by the Governor in Council. It is an undertaking which could not be entered into without express approval, and in the absence thereof the act of the Commission in attempting to agree to the term is null and void. The clause is a nullity, but severable, as I have said, from the remainder of the lease.

What is the proper construction to be put on the covenant "to keep the whole of the demised premises modern and up-to-date and in good repair and operating condition"? Counsel for the appellant contends that this covenant is divisible into two separate parts, *viz.*: (1) "to keep the whole of the demised premises modern and up-to-date" and (2) "to keep the whole of the demised premises . . . in good repair and operating condition."

The latter part is no doubt a covenant which might reasonably be expected from the lessee of any premises of the kind in question, and is incidental to the main terms and conditions of the lease. It falls within the authority given to the Commission by the order in council, and did not require express approval. I hold that it is valid. But it is contended on behalf of the appellant that the provision "to keep the whole of the demised premises modern and up-to-date" should be interpreted to mean that the Commission and the defendant were bound thereby to install certain transmitting and control apparatus and antennae at Bowmanville, and to repair and replace certain control room apparatus at the studio, the total expense being estimated approximately at \$127,090. It is urged that this covenant puts on the lessee and the defendant the obligation to replace all obsolete apparatus, equipment and parts thereof with modern and up-to-date facilities; that the obligation is not confined to the thing demised. I do not accept that argument or

that construction of the covenant. If the lessor had intended to place such a burden on the lessee, it required clear unequivocal language to do so. In the construction of the covenant the Court must consider the nature of the premises demised; its age and possible period of usefulness; the improvements in mechanical devices available in the business of broadcasting; the changing circumstances which the parties had in contemplation at the time the covenant was made; and the language of the covenant. The covenant does not include an obligation to reconstruct the whole broadcasting station in its entirety; nor does it mean that the lessee is bound to replace the whole or substantially the whole of the demised premises with new and different facilities to such an extent as to change the character of the subject-matter. In my view the learned trial judge has correctly defined the obligation of the lessee and the defendant. He says "the words carry an obligation to make all expenditures within reason to keep the existing plant abreast with the broadcasting art, but not to substitute a new plant for the old." Worn-out subordinate parts must be replaced with new, modern and up-to-date parts available for that purpose, but no equipment reasonably capable of use for the purpose intended need be thrown away merely because a more modern and up-to-date unit can be obtained. The thing demised by the lease must be kept modern and up-to-date and the covenant must be applied to that particular subject-matter. I may add that all equipment, apparatus and facilities of every kind used by the appellant at the studio in the King Edward Hotel, and delivered by it to the Commission, form part of the "demised premises", and are subject to the covenant and obligations arising therefrom.

Reference may be made to the following cases, but it must be remembered that effect must be given to the words of each covenant under consideration and the covenant must be considered, not in an abstract sense, but as applied to the subject-matter and the particular circumstances of each case: *Proudfoot v. Hart* (1890), 25 Q.B.D. 42; *Lister v. Lane & Nesham*, [1893] 2 Q.B. 212; *Torrens v. Walker*, [1906] 2 Ch. 166; *Lurcott v. Wakely & Wheeler*, [1911] 1 K.B. 905; *Royal Trust Company v. The King*, [1924] Ex. C.R. 121; *Pembery v. Lamdin*, [1940] 2 All E.R. 434.

If the covenant were so read to extend the obligation of the respondent as urged by the appellant, I would have no hesitation in holding that such a covenant would not be within the powers of the Commission at the time the lease was executed by it. It would require, in my opinion, express approval by the Governor in Council. Without such approval the provision seeking to impose or accept such an obligation is null and void.

The appellant's counsel argues that even if the provisions in the lease in respect to renewal (clause 12) and in respect to keeping the whole of the demised premises modern and up-to-date (clause 4) were beyond the authority of the Commission at the time the lease was executed, they obtain validity, and rights thereunder are enforceable, by virtue of the provisions in the Act passed in 1935 (c. 65). S. 1(3) of that Act provides that "On and after the first day of April, 1936, chapter fifty-one of the statutes of 1932 shall be read as if . . . [the amending statutes] had, respectively, never been enacted." It is said that the amending statutes were temporary in their nature and operation, and that in the circumstances it was competent for the Commission to enter into an arrangement which would become binding in law when the restriction on the exercise of its powers was removed. The result of such a construction would be that the covenants I have held to be null and void would be given validity and made enforceable in law. I think this result was not intended to follow from the legislation, and the argument must fail.

In accordance with the right given to the appellant by the learned trial judge, it elected to have a reference to ascertain the amount of damage sustained by it by reason of the breach of covenant on the part of the respondent "to keep the whole of the demised premises modern and up-to-date." The learned trial judge has found as a fact from the weight of evidence that "the Commission and its successor, the defendant Corporation, did not live up to the covenant." This finding of fact should be accepted and the reference should proceed on the basis thereof to determine the quantum of damages to which the appellant may be entitled. I agree, too, that the quantum of damages should be ascertained as of the date of termination of the tenancy as hereinafter discussed. The judgment after trial provided that the costs of the reference "be to the Plaintiff if the amount so found due thereon exceeds \$25,000, and to the

Defendant if the amount so found due be \$25,000 or a lesser amount". The evidence shows that the trial proceeded on the footing that there would be a reference to ascertain the damages, if any, sustained by the appellant. There was not the necessary evidence to determine the amount of such damage, and the costs of the reference should not be governed by the estimate of \$25,000 as made by the learned trial judge "in the hope that the litigation may be terminated." The judgment in respect of such costs should be varied, and, as varied, should direct that the plaintiff recover from the defendant the costs of the reference in any event.

I proceed to the question, "In what relationship did the parties stand to one another after the expiration of the period of three years as provided in the lease?" The learned trial judge has held that the Commission and the Corporation by their conduct became tenants of the appellant from year to year. I agree. It paid rental at the same annual rate as theretofore, and at the same periods. It gave no intimation of any intention to remain in occupation as tenant at will, and there is no evidence to rebut the presumption in law that the tenancy was from year to year. See *Young v. Bank of Nova Scotia* (1915), 34 O.L.R. 176, 23 D.L.R. 854; *Re Lyons and McVeity* (1919), 46 O.L.R. 148 at 152, 49 D.L.R. 635. The presumption is not rebutted by the plaintiff's claim that the term must be perpetually renewed, or by the provision in favour of the landlord, giving it the right to terminate the tenancy on thirty days' notice. I think that on 15th May 1936 the Commission had the capacity to become a yearly tenant of the appellant either by express agreement or by virtue of the presumption in law. In either case, the appellant became subject to all obligations incidental and attached by law to such tenancy. Moreover, the absence of an appropriation of money by Parliament did not incapacitate the appellant, or avoid such obligations. When did the tenancy terminate? The letter dated 26th January 1938, giving "notice of termination of the lease in question to take effect as from May 15th next" was not sufficient in law to end a tenancy from year to year on 15th May 1938. But was the tenancy ended on 15th May 1939? I think it was. "Each case must depend upon its own facts and circumstances": per Bankes L.J. in *P. Phipps and Company (Northampton and Towcester Breweries), Limited v. Rogers*, [1925] 1 K.B. 14 at 21. There is no require-

ment that the notice of termination of this lease should be in writing, and I doubt very much whether the letter in question can be taken in itself to be sufficient to terminate the tenancy on 15th May 1939. There must be a plain intention, made known by the tenant to the landlord, to give up all rights of occupancy at a certain time. It is for the Court to find in each case according to the evidence whether that requirement has been satisfied. The Corporation tendered to the appellant the keys of the premises at Bowmanville; an assignment of a lease of part of the premises which had been sublet by the Corporation was also tendered; the Corporation openly vacated the premises on 14th March 1939; it established the site of its undertaking at a new location. On 30th April 1938, the plaintiff issued a writ of summons herein and, *inter alia*, alleged that the defendant was a tenant from year to year; the plaintiff referred in the pleadings to the letter of 26th January 1938, and the defendant in its statement of defence asserted its rights to terminate the tenancy. The appellant and its legal advisers must be taken to have known and realized the determination of the respondent to bring the tenancy to an end at the earliest possible date. That date was certain and known to the appellant, if the tenancy was one from year to year as alleged.

It is argued that the validity of the lease is *res judicata* by reason of the judgment in the third party proceedings between the appellant and the Commission in the action brought by the King Edward Hotel Company Limited against Gooderham & Worts Limited. It is essential to examine the admissions made by the Commission and to consider carefully the issues before the Court in the case referred to. The claim then made was for rental in respect of offices used in connection with station CKGW and occupied by the appellant under the terms of a lease made by it with the King Edward Hotel Company Limited; and for damages for alleged breach of covenants therein. The appellant claimed that the lease was assigned by it to the Commission and that the Commission agreed to indemnify the appellant under the terms and conditions of the lease now in question against all loss, etc. The Commission admitted in its statement of defence "that by Indenture dated the 15th of May 1933, it leased all plant and equipment owned by the Defendant and used by it in connection with the operation of the Radio Broadcasting Station CKGW"; that on or about the 15th day of

May 1933, it entered into possession of all plant and equipment of the said Defendant, including the broadcasting studio premises in the plaintiff's premises, on King Street, Toronto, Ontario." It also admitted "that under the terms of the said lease of the 15th of May, 1933, it covenanted with the Defendant to indemnify and save harmless the Defendant against all loss, costs, charges, damages, expenses and liability whatsoever" under the lease made between the appellant and The King Edward Hotel Company Limited. As previously mentioned, the defendant was held liable and entitled to recover over from the third party the amount awarded by the Court for rental and damages. That judgment proceeded on the basis that a valid lease existed between the appellant and the Commission. That particular issue cannot now be raised in this action, because it was determined by the earlier judgment. The admissions made by the Commission went to the very foundation of the action. The Commission, and also the Corporation as its successor, are bound thereby. But the Court did not determine the validity of clause 4 or of clause 12 of the lease now in question. There was no adjudication in respect of either of them, and the points with respect to them did not properly belong to the subject of that litigation. Therefore, I agree with the view of the learned trial judge "that this defendant cannot now be heard to say the lease is completely void" . . . "the defendant in this action is estopped from denying the validity of the lease in its entirety." I think the respondent is entitled to attack the particular clauses now in question, *viz.*, clause 4 and clause 12, as being void, and is not in any way precluded from so doing by the proceedings or judgment in the previous action. See *McIntosh v. Parent*, 55 O.L.R. 552, [1924] 4 D.L.R. 420; *Foster v. Réaume*, 60 O.L.R. 63, [1927] 1 D.L.R. 1024; *Broken Hill Proprietary Company, Limited v. Municipal Council of Broken Hill*, [1926] A.C. 94; *Hoystead et al. v. Commissioner of Taxation*, [1926] A.C. 155; *New Brunswick Railway Company v. British and French Corporation, Limited*, [1939] A.C. 1.

It is unnecessary, I think, to discuss the niceties of distinction or qualifications of the general rule on the subject of *res judicata*. It is sufficient to consider the underlying principles and apply them to the particular circumstances of this case.

For the reasons given I am of the opinion that the appeal in the matter of costs of the reference as directed by the learned

trial judge should be allowed, and the judgment of Greene J. varied to provide that such costs shall be paid by the defendant to the plaintiff in any event, forthwith after taxation thereof. On all other matters the appeal should be dismissed and the judgment of Greene J. affirmed. The costs of the appeal should be paid by the appellant to the respondent forthwith after taxation. The cross-appeal should be dismissed with costs.

Judgment varied as to costs of reference, costs of appeal to respondents; cross-appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Long & Daly (Daly, Hamilton & Thistle), Toronto.

Solicitors for the defendant, respondent: Jennings & Clute, Toronto.

[COURT OF APPEAL.]

J. R. Mooney & Company v. Pearl Assurance Company Limited.

Insurance—Fidelity Bond—Construction—"Dishonest act"—Exclusion of Loss "directly or indirectly from trading"—Substitution of New for Old Bond—Limitation of Action—Notice and Proofs of Loss—Estoppel—Allowance of Interest—The Judicature Act, R.S.O. 1937, c. 100, s. 34.

The defendant insured the plaintiff, a firm of stockbrokers, against, *inter alia*, loss "through any dishonest act of any of the employees". Among the exclusions in the policy was listed any loss "directly or indirectly from trading". *Held*, the exclusion clause must be read in its plain meaning, and effect must be given to it. The mere fact that, because the insured were stockbrokers, all losses must be in some way connected with trading did not affect the matter, since what was excluded was a loss *resulting from* trading, and there might be many losses caused by dishonest acts of employees which would not be trading losses.

After the original contract had been in force for a little more than three years, a new contract, in a revised form, was issued at the insurer's suggestion. Under the second contract, the insured had a period of fifteen months, after discovery of a loss, within which to bring his action, but under the first contract the period was one year. *Held*, on a consideration of all the facts and circumstances of the case, the insurer had led the insured to think that the new bond was merely an extension of the coverage previously given, and that all losses were recoverable under the second policy, and it was now estopped from contending that the claim, in so far as it related to losses occurring during the period of the first bond, was barred because the action was not brought within one year after discovery of the losses.

AN appeal by the defendant from the judgment of Hope J., [1942] O.R. 533, [1942] 4 D.L.R. 13, 9 I.L.R. 379.

10th to 12th and 16th to 19th February 1943. The appeal was heard by ROBERTSON C.J.O. and FISHER and GILLANDERS JJ.A.

T. N. Phelan, K.C. (B. O'Brien with him), for the defendant, appellant: The trial judge has directed recovery for losses which were within our exclusion clause, as trading losses. The bond covered all dishonest acts, except those related to trading. Knowing the opportunities for manipulating accounts, we specifically excluded losses from trading. When we do insure against such losses, we stipulate certain precautions, and the nature of these precautions must indicate to the Court what we mean by trading losses. No such precautions were required here, because trading losses were excluded, and the consequence is that the plaintiffs recover without having paid any premium for such protection. The trial judge has in effect held that all that has been excluded from the coverage is innocent trading losses.

It is a condition precedent of any liability that written notice must be given by the assured. The trial judge has held that written notice was given by the confession of Carlaw, the defaulting employee. This is not notice under the terms of the bond; it is only an effort by Carlaw to avoid the consequences of his acts. No written notice as such was given by the plaintiffs after learning of their loss. The trial judge has found, however, that certain correspondence, relating only to the second bond, constituted sufficient notice. As to the first bond, he found that there was no written notice, but that the insurer must be taken, by its conduct, to have waived the requirement. The whole doctrine of waiver is based upon estoppel, and we have done nothing to estop ourselves. Waiver is based upon a fresh contract or estoppel, and it is established if the other party has relied on, and been misled by, any statement made by us: 7 Halsbury, 2nd ed., 204. The evidence must be clear and unequivocal, and there must have been communication to the other party: *Scarf v. Jardine* (1882), 7 App. Cas. 345. Further, waiver was not pleaded, and it can therefore not be relied on as an answer: *The Supreme Tent Knights of the Maccabees of the World v. Hilliker* (1899), 29 S.C.R. 397.

There was a clear and unambiguous contract in force, and full effect should be given to its conditions: *Johnston v. Dominion of Canada Guarantee and Accident Insurance Company* (1908), 17 O.L.R. 462 at 479, 482; *In re Coleman's Depositories*,

Limited and The Life and Health Assurance Association, [1907] 2 K.B. 798 at 808; *Provident Assurance Company v. Adamson and Marshall*, [1938] S.C.R. 482, [1939] 1 D.L.R. 609, 6 I.L.R. 1.

The trial judge commented upon our failure to furnish proof of loss forms, as required by s. 94 of The Insurance Act, R.S.O. 1937, c. 256. But this obligation is dependent upon the insured giving notice of his claim, and in any event non-compliance with this statutory provision could, at most, render us liable to a penalty.

The proofs of loss which were furnished showed that Carlaw had made fictitious entries, and established false credits in the books, but they did not disclose any loss resulting from these false entries and manipulations of the accounts. In any case, these must be trading losses: Carlaw had access to certain moneys because of his position as the man in charge of trading; if he could defraud the insured in this way, then the loss is one resulting directly from trading. The itemized proof of claim furnished to us is really a statement of methods used to manipulate accounts; we are surely entitled to clear proof of how the loss was incurred, showing whether it came under the general coverage or within the exclusion.

The original bond contained a twelve-months' limitation period. The writ, when issued, made no reference to the original bond; it was not mentioned until the delivery of the statement of claim, nearly seven months after the expiry of the limitation period. The insured's failure to comply with the conditions of the policy is an absolute bar to recovery: *Schubert et al. v. The Sterling Trusts Corporation et al.*, [1938] O.W.N. 133; *Johnston v. Dominion of Canada Guarantee and Accident Insurance Company, supra*. Our correspondence and negotiations were as much "without prejudice" as in the *Johnston* case, and in no way destroyed our rights.

These losses were all the result of one long complicated deal, and the very thing against which we attempted to protect ourselves by the exclusion clause. We claim to be relieved of liability for whatever the auditors describe as a direct trading loss. Our right to a proper proof of loss is a contractual one, and we cannot be liable until the insured has fully performed his obligation: *Hiddle et al. v. National Fire and Marine Insurance Company of New Zealand*, [1896] A.C. 372. The plaintiffs

had all the information, and neither gave it to us nor made it available; they should bear the whole liability for their failure to comply with the conditions of the bond, instead of which they have profited. The trial judge allowed them to claim for an amount of \$2,000, which had never been mentioned in their pleadings or in the proofs of loss. Further, he allowed them interest. The granting of interest is always based upon the theory that the defendant, having knowledge of the amount of its indebtedness, could have paid the amount to the plaintiff at an earlier date. It is apparent in this case that the amount was in dispute right down to, and even after, the trial. The defendant should therefore not be burdened with interest, not only on the original claim, but even on an amount allowed by amendment after trial: *The Judicature Act*, R.S.O. 1937, c. 100; *Holmsted & Langton*, 5th ed., p. 229, ss. 33 and 34; *McLean v. Canadian Pacific Railway Co.* (1923), 53 O.L.R. 533; *Toronto Railway Company v. The City of Toronto*, [1906] A.C. 117, C.R. [1906] A.C. 286.

Even if the plaintiffs succeed, salvage should be applied in reduction of the loss, and the recovery should be further reduced by that part of the claim which represents commissions charged by the plaintiffs on the trading done by Carlaw.

No premium was paid on the original bond after 7th July 1937, and no list of employees was furnished after that date, and the bond therefore ceased to be effective after that date: *Darling v. Sun Life Assurance Company of Canada*, [1943] O.R. 26, [1943] 1 D.L.R. 316, 10 I.L.R. 1. There were two separate contracts.

J. Earl Lawson, K.C., for the plaintiffs, respondents: The first bond is still in force; it was of indefinite duration, and could be cancelled only on proper notice. [ROBERTSON C.J.O.: You say that nothing happened to terminate the first bond?] Yes.

The appellant had actual notice, as much as we had, and this should be sufficient. The correspondence between the parties is clear proof that the insurer had notice. The effect of the words "without prejudice" is based upon an idea of contract: *Wigmore on Evidence*, 3rd ed., s. 1061; *In re River Steamer Company; Mitchell's Claim* (1871), L.R. 6 Ch. 822 at 832. The circumstances in this case are widely different from those in *Johnston v. Dominion of Canada Guarantee and Accident Insurance Company* (1908), 17 O.L.R. 462.

The appellant had written notice, though it was not signed by the insured themselves, and it acknowledged such notice in its correspondence. A reasonable and practicable interpretation must be put upon the conditions of the bond, and the most technical construction of the words cannot be insisted upon: *Canadian National Railway Company v. Canadian Industries Limited*, [1941] S.C.R. 591, [1941] 4 D.L.R. 561; *The Globe Savings and Loan Company v. The Employers' Liability Assurance Corporation* (1901), 13 Man. R. 531. The requirement of the policy as to notice may be waived by the conduct of the insurer: *Lampkin v. The Ontario Marine and Fire Insurance Company* (1855), 12 U.C.Q.B. 578. The evidence discloses a waiver by election, and, under the above cases, we are also entitled to rely upon estoppel by conduct.

The sufficiency of the proofs of loss is a question of fact, depending upon the circumstances of each case, and the trial judge's finding in this respect should not be disturbed. The writ was issued within the time specified, if the words "learn of such loss" are properly construed, because of the agreement made as to providing further data and information. Further, the appellant is estopped by its conduct from setting up as a defence the limitation period provided for in the bond. The bond was drawn by the insurer, and should be construed against it, not in its favour. [ROBERTSON C.J.O.: That rule applies only in case of an ambiguity.] It was necessary for us to obtain sufficient information to establish Carlaw's misconduct clearly: *McDonald v. London Guarantee and Accident Co.* (1909), 13 O.W.R. 403. We were still discovering losses, and endeavouring to determine their extent, until March 1938, and even thereafter; the writ was issued within less than twelve months of that time. It is not necessary that the writ should be issued within twelve months after the first discovery; we must have a reasonable time in which to discover other dishonest acts. Clause 6 must be construed with reference to the whole contract.

The limitation clause, 6, is not a condition precedent to the appellant's liability, and it has waived compliance. The nature of the limitation itself shows that it is not a condition precedent, since it cannot be performed until after the liability of the insurer has arisen: *The London Guarantee Company v. Fearnley* (1880), 5 App. Cas. 911 at 916. The Court may therefore relieve

against failure in this respect without imposing an extra-contractual liability on the insurer.

As to salvage, we are entitled to apply this against any losses sustained as a result of Carlaw's misconduct, and first against uninsured losses. The relationship existing between us and Carlaw at the time of recovery of this salvage was that of debtor and creditor. The contractual obligation of the parties to the action in no way varies our right as creditor to appropriate the salvage at our discretion: 7 Halsbury, 2nd ed., pp. 244, 247; 16 Halsbury, 2nd ed., p. 124.

V. Evan Gray, K.C., for the plaintiffs, respondents: This bond is a contract of indemnity, and is not for the payment of any fixed sum: *Commercial Finance Corporation Ltd. v. Merchants' Casualty Insurance Co.*; *The same v. Western Assurance Co.*, 66 O.L.R. 10, [1931] 1 D.L.R. 212. The original liability rests upon the contract. Salvage is recognized to be the property of the insured and no one else; the appellant, having denied liability for a substantial part of the claim, had no right to take any security for their own benefit. The fact that Mrs. Carlaw returned certain securities to us had nothing to do with the question of salvage; if these were our moneys and securities, their application cannot be affected by anything done or said by Carlaw or his wife.

Where there is a plea of waiver, two alternative things are meant. The first situation is that the party against whom the breach has been committed is estopped by his own conduct from claiming the benefit of the breach. This principle is derived from equity, and is thoroughly discussed in *Greenwood v. Martins Bank, Limited*, [1933] A.C. 51; I refer also to *Parsons v. Crabb* (1871), 31 U.C.Q.B. 434 at 450; *Duffield v. Mutual Life Insurance Co. of New York* (1914), 32 O.L.R. 299, 20 D.L.R. 467. The matter of waiver by a fresh contract is dealt with in 6 Canadian Bar Review, p. 269. The onus of proving election is on the insurer, and until he makes this election, the policy remains in force. An unequivocal act subsequent to the breach constitutes an election to waive, i.e., waiver by fresh contract: *Scarf v. Jardine* (1882), 7 App. Cas. 345. The trial judge based his decision on estoppel by conduct.

We base our claim on the bond as written, and claim that the whole loss is payable under the first bond. This bond states the date of commencement, but not the date of expiry; it is therefore a bond of indefinite duration. The

appellant cannot claim that the new bond was substituted for the old one on a basis of oral agreement, because the parties were never *ad idem*. There must be mutuality of agreement to cancel the bond, and there was no such agreement: *Stuyvesant Insurance Company v. Canadian Hat Manufacturing Company* (1919), 26 R.L.N.S. 214. If the new bond had not deprived us of any valuable right, the insurer might have a basis for alleging an oral agreement for substitution, but if it did so deprive us, the basis of the oral agreement is gone. On the evidence, there was no effective agreement for cancellation. After a loss has occurred, the cause of action thus accrued can be extinguished only by release or accord and satisfaction: *Brown v. The British America Assurance Company* (1875), 25 U.C.C.P. 514. The insurer is bound by the application as well as the bond itself, and nowhere is there anything to indicate that the duration of the bond is to be terminated at any defined point of time. The consideration for the bond is the payment of subsequent annual premiums, but it does not say when the premiums are to be paid. The liability of the insured to pay the premiums is enough to keep the bond in force; actual payment is not required. A contract of this type is distinguishable from fire and life insurance policies. The new bond, in 1937, did not provide for accrued losses, and therefore if the new bond terminated the old one, there was no continuity of coverage.

The so-called trading losses were clearly covered by the words "any dishonest act" in the insuring clause. The exclusion clause must be restricted in its meaning and scope. If it stood alone, all losses arising from Carlaw's manipulations might be excluded, since the words are absolute. The clause must be construed, not only according to the meaning of the words themselves, but with reference to the entire context and to the circumstances in which the bond was issued. No court will permit a contract to be construed piece by piece: *The Australian Agricultural Company v. Saunders* (1875), L.R. 10 C.P. 668. Due regard must be given to the application, the reference to the risk, the proper payment for coverage, the way in which the parties intended the bond to be read, and the reasonable expectation of an ordinary business man when making an ordinary business contract: *Yorkshire Insurance Company, Limited v. Campbell*, [1917] A.C. 218; *World Exchange Bank v. Commercial Casualty Insurance Company* (1930), 225 N.Y. 1 at 5.

The trial judge found much assistance in *Paddleford et al. v. Fidelity and Casualty Company of New York; The same v. Hartford Accident & Indemnity Co.* (1938), 100 Fed. 2nd series, 606; 306 U.S. 664. Since this bond was imported from the United States, American decisions may usefully be considered, and the *Paddleford* case is directly in point. I refer also to 17 Corpus Juris Secundum, s.v. "Contracts", ss. 309, 319.

The case at bar is distinguishable from *Darling v. Sun Life Assurance Company of Canada*, *supra*, because it is clearly established that a contract of life insurance continues only if the premium is paid on the due date. Here the bond is admittedly of indefinite duration, and the bond itself provides for a credit if the premium is not paid: *The Solvency Mutual Guarantee Company v. York et al.* (1858), 3 H. & N. 588, 157 E.R. 603. In view of s. 93 of The Insurance Act, this authority is scarcely necessary, but it is of interest in this connection.

T. N. Phelan, K.C., in reply: We do not deny that we had knowledge of the loss, but the contract obliges us only to pay a claim of which we have written notice. The doctrine of waiver or estoppel, in insurance law, must depend upon unequivocal acts or statements, and we cannot be said to have acted unequivocally when all our letters and acts were expressed to be without prejudice: *Walsh v. The Excelsior Life Insurance Co.*, [1935] O.R. 459, [1935] 4 D.L.R. 183, 2 I.L.R. 487. Where waiver is based upon estoppel, it is in effect a representation, and it must be proved that the other party was induced to change his position as a result of the representation. There was no such representation here. The defence of waiver must be pleaded.

The proofs of loss submitted do not comply with the conditions of the contract. The proof must be so complete that it contains all the necessary information; here even experienced auditors were unable to ascertain correctly the amount or origin of the losses. The action is therefore premature, since our liability does not arise until clear proof of loss is provided: *Hiddle et al. v. National Fire and Marine Insurance Company of New Zealand*, [1896] A.C. 372. In the eleven categories of loss enumerated, there is no mention of trading losses. The bond itself entitles us to an itemized proof of loss, and s. 94 of The Insurance Act contemplates formal notice of the claim before we are required to forward forms.

The trial judge permitted the plaintiffs to amend the statement of claim so as to increase the amount claimed. This was allowed upon the assumption that fresh facts had been discovered after the proofs of loss had been furnished. There was no evidence that fresh facts had been discovered after the issue of the writ, and anything discovered before that time should have appeared either in the original or in the amended statement of claim. So substantial an amendment should not have been permitted after the expiry of the limitation period under both bonds: *Schubert et al. v. The Sterling Trusts Corporation*, [1938] O.W.N. 133; *Kong et al. v. Toronto Transportation Commission*, [1942] O.R. 433, [1942] 3 D.L.R. 312.

If the losses are claimed under the first bond, how do the plaintiffs dispose of the second bond? There were two separate and distinct contracts accepted by them and sued upon.

It was the intention of the parties to exclude dishonest trading losses. The *Paddleford* case, *supra*, has been criticized, on the basis that the Court in effect made a new contract between the parties, interfering with the original terms. The same result has been attained here.

Cur. adv. vult.

15th July 1943. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—An appeal from the judgment of Hope J., dated 2nd September 1942, after the trial of the action before him at Toronto, without a jury. By the judgment in appeal the respondents were awarded the sum of \$21,484.43, and a further sum of \$4,705.98 for interest thereon, under two contracts of insurance issued by appellant.

The respondents are brokers, and carry on business at the city of Toronto. On respondents' application the appellant issued to them an insurance contract, dated 7th July 1934, insuring the respondents against direct loss to any amount not exceeding \$25,000 of money, (which the contract declared should be deemed to mean currency, coin, bank-notes, bullion and uncanceled Dominion of Canada or United States postage and revenue stamps, bonds, debentures, scrip, certificates, warrants, transfers, coupons, bills of exchange, promissory notes, cheques or other similar securities) in which the insured had a pecuniary interest, or for which it was legally liable, sustained by the insured subsequent to noon of the date of the contract and

while it was in force, and discovered by the insured subsequent to noon of the date of the contract and prior to the expiration of twelve months after its termination as provided in Condition 11, "(a) Through theft, as defined by the Criminal Code of Canada, committed by any of the employees, and whether committed directly or by collusion with others;" (b) through what, for convenience, has been briefly called "inside hold-up"; and (c) through what, in the same way, has been called "outside hold-up." By an endorsement, the following clause was substituted for the above quoted clause (a):—

"(A) Through any dishonest act of any of the employees wherever committed, and whether committed directly or by collusion with others."

After this first contract had been in force for some three years, at the suggestion of the appellant another insurance contract was issued by it to respondents covering similar losses, and for the same maximum amount, but differing in some of its terms. The description of losses in clause (A) of the second contract is as follows:—

"(A) Any loss through any dishonest, fraudulent or criminal act of any of the Employees, including loss of Property through any such act of any of the Employees, whether acting alone or in collusion with others and wherever any such act may be committed."

The second contract was issued, according to the evidence of appellant's manager for Canada, in consequence of the Canadian Underwriters' Association, of which it was a member, having adopted a new form of broker's "blanket bond", which all members of the Association were ordered to use, replacing any outstanding contract with a contract in the new form, not later than its next renewal date.

On 17th November 1937 the respondents discovered some wrong-doing on the part of an employee named Carlaw, who had been in their employ since May 1934. Further investigation and a written confession of Carlaw, obtained by appellant's investigator, disclosed that the total loss of respondents, through Carlaw's dishonest acts, amounted to a large sum. It is in respect of the losses through Carlaw's misconduct that the claim in question arose.

As the learned trial judge has, in his judgment, set forth the material parts of the two contracts, and stated the material and

somewhat complicated facts, and the issues that arise, I forego repeating them, and shall deal only with the questions in which I have arrived at a different result, or in respect of which I arrive at the same result but on different grounds.

Each of the two insurance contracts contains a list of exclusions from the losses covered, and among the losses so excluded is any loss directly or indirectly from trading. It is not necessary that I quote here in full the clause as it appears in the contracts. The learned trial judge considered it necessary, on a proper construction of the contracts, to read into the exclusion clause the limiting words "unless through the dishonest act of an employee". As the only clause in the insuring part of the contract within which losses from trading can come is clause (A), and that clause covers nothing but losses "through any dishonest act of any of the employees", the effect of the words that the learned judge considers it necessary to read into the exclusion clause is to deprive it of any force whatsoever. If the clause excluding losses from trading does not apply in the case of losses through the dishonest acts of an employee, there are no losses to which the excluding clause can be applied. In effect, it would be quite as legitimate, instead of reading the words the learned trial judge suggests into the clause excluding losses from trading, to read in the words, "but this clause shall not apply to anything elsewhere contained in this contract."

It is one of the important principles of the interpretation of contracts that effect is to be given, if possible, to all the words they contain, and here the effort must be to give to the exclusion clause its proper meaning and effect, and not to read it out of the contract altogether. I do not doubt that there were addressed to the learned trial judge, as there were addressed on the appeal by counsel for appellant, arguments as to the interpretation of the words "any loss from trading" in the exclusion clause, that gave a meaning so wide that they would include all respondents' business activities, leaving nothing at all within the insuring clause (A) that the exclusion clause did not eliminate. I venture to think, however, that the term "losses from trading" can, more naturally, be given a more restricted meaning, and that a broker may suffer a loss through the dishonest act of an employee that will not be a loss from trading. I suggest theft of money or securities, or forgery of endorsement on negotiable instruments, as possible causes of losses that would not, in the

ordinary meaning of the words, come within the term "losses from trading."

I have not overlooked the words "directly or indirectly" that appear in the exclusion clause. The learned trial judge says that "Owing to the very nature of the business conducted by the insured, 'any dishonest act' of an employee, it would seem obvious, must of necessity be in connection with some trading transaction, and hence any such loss would be a 'trading loss.' I find it difficult to appreciate 'any dishonest act' of an employee in the course of his employment, which, either directly or indirectly, and however remotely, would not be related in some way with a trading transaction." The words in the exclusion clause are "any loss directly or indirectly from trading". It says nothing about losses directly or indirectly "related in some way with a trading transaction". Neither, in my opinion, is it necessary that "any dishonest act" of an employee should be "in connection with" some trading transaction. If an employee fraudulently took from his employer's possession a share certificate and gave it to another broker, with instructions to sell it, that would, in my opinion, be a loss of the employer from theft and not from trading. The loss occurred when the certificate was stolen, and was complete whether or not there was later a sale of the shares. It was not a loss from trading. If an employee fraudulently issued, or procured to be issued, a cheque on a client's account, and forged an endorsement and cashed the cheque, there would be a dishonest act that might have involved the commission of more than one crime, and certainly involved loss to the employer, but it would not be a loss from trading. Carlaw did dishonest acts of the character of both of these, as well as many others that his ingenuity devised, and that varied considerably in detail.

With respect, I am unable to adopt the construction of the contract that the learned trial judge placed upon it, and am of opinion that the exclusion clause (g) should be given effect according to its terms and without the limiting words that the trial judge would read into it. I am further of opinion that there were numerous and substantial losses through dishonest acts of Carlaw, that do not come within the exclusion clause (g), and that were, therefore, covered by the contract. Without attempting to define precisely, by illustration or otherwise, what is and what is not a loss that comes within the exclusion clause

(g), I call attention to this, that the "loss" that the clause speaks of is the employer's loss, and not that of the employee. And further, that the loss, to be excluded, must be "from trading", and not merely "in connection with" or "in some way related to" a trading transaction. The trading must at least precede the insured's loss, whether the loss is directly or indirectly from trading. The "trading" referred to is, of course, very broadly defined in the clause itself.

In the course of argument counsel referred to an exhibit that had been prepared by Mr. Patterson, a witness called for the appellant, in which he segregated and collected the losses that he classified as trading losses, and some instances were cited. I do not understand that the respondents have in any way admitted their agreement with the classification made in this exhibit, and we have not before us material upon which the Court could make a finding, but the analysis and summary prepared by Mr. Patterson may furnish the parties a basis for agreeing upon the amount of their losses that, according to our construction of the contract, is excluded by clause (g). In default of agreement there will be a reference to the Master of that matter.

Appellant raises a number of defences based on the requirements of the contracts, as to notice of loss and proof of loss, and the period of limitation for bringing action. The last-mentioned defence relates only to such part of the claim as is made under the first contract. The provisions of the contracts and the facts in relation to these matters are fully set forth in the judgment of the learned trial judge. In my opinion he was right in not giving effect to any of these defences. Although appellant may not have had notice in writing from respondents of their loss within the time stated in the contract, it was informed of the fact of loss on the day respondents learned of it, and appellant at once put its own investigator at work, and on the next day he secured Carlaw's written confession. Much happened afterwards that, in my opinion, amounted to a waiver by appellant of any more formal compliance with the requirements of the contracts as to notice of loss. As to notice of loss, as well as proofs of loss, appellant relies strongly upon a letter from appellant to respondents of 18th November 1937, the day after discovery of a loss. After stating that an alleged claim had been reported to them, and that it had come to their atten-

tion that at least some of the loss was due to trading losses, which were not covered, the letter proceeded—

“It is always our wish to co-operate in a matter of this kind and to serve our clients, but you will quite appreciate that in order to do so, it is necessary for an understanding between ourselves and our assured, that any action taken in attempting to secure salvage or to handle the loss in any way by us, must be without prejudice as to the interests of this Company or our assured.

“This letter is merely for the purpose of putting the matter before you so that there will not be any misunderstanding later on, and in order that we may immediately get to work and see what headway can be made. We would therefore appreciate an answer immediately.”

Appellant contends that the effect of this letter is to prevent respondents relying upon anything said or done by appellant thereafter, in relation to notice of loss or proofs of loss, that might otherwise be regarded as a waiver of any of its rights in respect to them. I do not think the letter is fairly capable of such a construction. Appellant had reference, I think, only to such things as they might do to secure salvage or otherwise improve the position so far as the amount of the loss was concerned. The letter cannot reasonably be taken to refer to what might occur between insurer and insured themselves with respect to notice of claim or proofs of loss.

Late at night on 17th November 1937, the day Carlaw's defalcation was first discovered, an interview took place between Mr. Butler, appellant's manager at Toronto, and Mr. Mooney, when there was some discussion of the possible amount of the defalcations, and something was said also as to their nature. Mr. Butler says that at this interview he told Mr. Mooney that he thought it would be a good idea if a good firm of auditors were installed to examine the books, so that they could arrive at a proper settlement, and he suggested the firm of Clarkson, Gordon & Dilworth. This interview was before even a statement in writing was obtained from Carlaw by the investigator whom appellant had promptly set at work. Mr. Butler says, further, that he made the offer to supply the auditors to assist him in preparing his proofs of loss. Mooney said he would think it over. Much was made by appellant's counsel of respondents' failure to act upon these suggestions, but I think it is understandable.

Mr. Butler does not appear to have pressed his proposals. Proofs of loss in considerable detail were delivered by respondents on 16th February 1938, and were referred by appellant to their auditors, and on 28th February 1938 Mr. Butler wrote respondents and said that the data were not sufficiently complete properly to investigate the claim. He asked for a great deal of further detailed information that their auditors had suggested they ask for, and concluded as follows: "Will you kindly forward the information asked for in this letter at your earliest convenience as we wish to complete the review of your claim and give it attention without delay." This would seem to afford good evidence of waiver by appellant of any objection up to that time in respect of notice and proofs of loss.

The further information requested in this letter was not furnished. The requirements made were hardly of the character that would form part of the proofs of loss in ordinary circumstances, and an auditor's requirements may be very exacting. In fact, if an insured is required to furnish all that the letter of 28th February 1938 demands, I do not know where the demands would end. At an interview about two months later, Mr. Patterson, of the firm of auditors, seems to have agreed that their demands might well be modified. In the final result none of the further information requested was supplied until after the issue of the writ, when the auditors were permitted to make their own investigation in respondents' office. The learned trial judge has found that the proof of loss furnished amply met the demands of the condition in the contracts, and I am not prepared to disagree with him.

In such a case as the present it would, I think, be almost, if not quite, impossible for the insurer to satisfy itself of the details of the transactions that resulted in the loss for which claim is made, without an investigation of the books of account and relevant vouchers. I have seen no reference to a request by appellant to be allowed to make such an investigation before action was commenced, and, apparently, it was arranged without difficulty when asked for.

So far as losses under the first contract are concerned, appellant contends that the action was not brought within the limitation period fixed by the contract, that is, within twelve months after the insured learned of the loss. The writ was issued on 16th February 1939, and the respondents learned of the loss on

17th November 1937. Further than that, however, appellant says that action was brought only upon the second contract, and that no mention was made of the first contract until delivery of the statement of claim in the following June. The larger part of the loss claimed occurred before 7th July 1937, the date of the second contract. It should also be mentioned that the claim made in the proofs of loss referred only to the second contract, and such correspondence as appellant addressed to the respondents was headed with a reference to the second contract only. Much argument was addressed upon the questions whether both contracts were in force at the time the loss was discovered, and if only one was then in force, which one, and a situation that is a complex one was made actually confusing by the variety of alternative propositions put forward by counsel. The learned trial judge concluded that appellant had, by a course of conduct, "waived the limitation period of twelve months, as set out in the first bond, and is now estopped from claiming the benefits thereunder." Without saying that I am in disagreement with the way in which the learned trial judge has put it, I shall attempt to put my view of the matter in my own way.

It is necessary first to refer back to what occurred in the negotiation for the issue of the second contract. For three years respondents had been profitable clients. The first year's premium on the first bond had been \$830.55, and for three years there were no claims. The 1937 premium was \$1,463.70. Such clients are not found every day, and they must be carefully handled. Both Mr. Butler, appellant's manager at Toronto, and Mr. Watson, the agent who brought in the business, called upon respondents to negotiate the exchange in the form of contract that the Underwriters' Association had ordered. This was, so they represented, a standardized form, a better bond with broader coverage, with which, under the Association's requirement, they desired to replace the existing bond. It is to be noted that the interview did not actually take place until some weeks after the old bond had entered on its fourth year on 7th July 1937, and the bond was not one that in any case could be got rid of by simply declining to renew. Notice was necessary. It was late in August when the agent sent respondents the form of application for the new bond, for their signature, and it would appear that the new bond was not actually delivered until September, although it is dated back to 7th July 1937. Mr. Mooney

says in his evidence that Mr. Butler assured him in answer to a specific question, that in no respect did respondents lose anything by the change. Mr. Mooney further says that his understanding of the transaction was that respondents were given "the new bond as a substitution and continuation of the coverage" they had previously under the old bond, but with an extended coverage for the future. While, naturally, Mr. Butler does not give evidence of Mr. Mooney's understanding of their interview, I do not read his evidence as in any way disputing Mr. Mooney's evidence of what was said. Mr. Butler's statement to Mr. Mooney that respondents did not lose anything, or, as Mr. Butler himself has it, did not give up anything, was not wholly accurate. In the description of the losses covered by the first contract, they were limited to losses "discovered by the insured . . . prior to the expiration of twelve months after the termination of this bond as provided in Condition 11". According to the claim made in argument by appellant's counsel, this limitation applies in this case and limits the losses recoverable under the first contract to any that were discovered within twelve months from the date of the new contract. Mr. Butler's inaccurate statement was, no doubt, made inadvertently and with no intention to mislead, but it bore directly upon the question in regard to which respondents were careful to inquire, that is, whether their rights under the old bond were continued. The assurance was that they were, and Mr. Mooney so understood it.

I am not considering a question as to whether respondents would have the right to rely upon what was said to them, or upon deductions they made from Mr. Butler's statements, instead of reading the contract itself to learn their position. I have mentioned in some detail the occurrence in connection with the substitution of a new contract for the old, because that is essential, in my opinion, to a proper appreciation of the effect on the minds of respondents of the course pursued by Mr. Butler in his written communications with respondents in respect of the loss, which correspondence began only three months or so after the negotiation of the new contract. The essence of Mr. Butler's assurance to Mr. Mooney in exchanging the contracts was that nothing was being disturbed; they were merely giving them this new contract with a somewhat broader coverage. It is perhaps of some significance in this connection that nothing whatever was

done by way of clearing off the old contract, and we had argument addressed to us that it remained in force.

It is plain that from the time Carlaw's defalcation was discovered Mr. Butler was thoroughly informed of the fact that losses had occurred within the period of each of the two contracts. Notwithstanding this, on 18th November 1937, he wrote the first letter that passed between the parties on the subject of the loss under a heading that referred to the second contract only, and he continued to do so throughout. His letters speak of losses in a manner to include all the losses, and that is what he intended them to be understood as referring to. Mr. Butler candidly concedes this, and explains his inadvertence in a manner that the trial judge, no doubt properly, accepted. That does not, however, overcome the fact that respondents were confirmed in the mistaken idea they had held from the issue of the second contract, that it continued any protection they had had under the first, and that their losses were all recoverable under the second contract. There can be little doubt that it was in this way that respondents came to believe that they had fifteen months from learning of the loss within which to sue, and there is a good deal to indicate that Mr. Butler and the agent Watson were of the like belief. In my opinion, this belief on the part of respondents had its beginning in the too broad assurances given the respondents when the second contract was in negotiation, and was fostered and confirmed by the misleading heading under which appellant's letters regarding the loss were written. I do not suggest for a moment any intention on the part of Mr. Butler to misrepresent or to mislead, but in fact he did lead respondents into a mistaken opinion that there was one period of limitation for all the losses in question, and, in my opinion, appellant is estopped from now contending otherwise.

The only other matters with which I have to deal are certain particular allowances made the respondents by the judgment in appeal. The learned trial judge allowed respondents interest. In my opinion it is not a case for allowing interest. The claim was not for a debt or sum certain within s. 34 of The Judicature Act, and if the views I have expressed as to the amount respondents are entitled to recover, are sound, there has not been, at any time, a sum definitely ascertained as the sum properly payable.

Except as I have indicated, the appeal should be dismissed. As success is divided there should be no costs of the appeal to either party.

Trial judgment varied; no costs.

Solicitors for the plaintiffs, respondents: Lawson & Stratton, Toronto.

Solicitors for the defendant, appellant: Phelan, Richardson, O'Brien & Phelan, Toronto.

[COURT OF APPEAL.]

Downing (Anglo-Canadian Music Company) v. The General Synod of the Church of England in Canada et al.

Copyright—Assignment—Alleged Written Assignment Lost—Sufficiency of Evidence of its Existence—Whether Equitable Assignment Possible—The Copyright Act, R.S.C. 1927, c. 32, ss. 12, 40, 45, as amended.

In an action for an injunction and for damages for infringement of copyright, based upon an alleged assignment in writing of the copyright from the composer to the plaintiff, which assignment could not be produced at the trial, *held*, on the evidence, the plaintiff, who alleged that the document had been lost, had not succeeded in establishing its existence. This being so, the foundation of the action was destroyed, and it was unnecessary to consider other questions.

Quaere, whether, under ss. 12, 40 and 45 of The Copyright Act, R.S.C. 1927, c. 32, as amended, an equitable assignment of a copyright is now possible, and, if so, what are the rights of the assignee.

AN appeal by the defendants and third parties from the judgment of Roach J., [1943] O.R. 99, [1943] 1 D.L.R. 446, 3 Fox Pat. C. 35, 2 C.P.R. 171. The facts are fully stated in the report of the trial judgment, and in the judgment now reported.

4th to 6th May 1943. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and LAIDLAW JJ.A.

F. J. Hughes, K.C. (Hamilton Cassels, K.C., with him), for the defendant Oxford University Press, appellant: The plaintiff has completely failed to establish that there was in fact an assignment in writing of the copyright to him; strict proof of the existence of such an assignment was essential: *The Insurance Company of North America v. Colonial Steamships Limited*, [1942] Ex. C.R. 79 at 86-7, 8 I.L.R. 121, affirmed [1942] S.C.R. 357, [1942] 3 D.L.R. 225, 54 C.R.T.C. 377; *Ross v. Williamson* (1887), 14 O.R. 184. We are asking the Court, not so much to

reverse a finding of fact made on contradictory evidence as to deal with a matter, the evidence of Canon Pilcher, which has been entirely omitted from the trial judge's reasons: *Dominion Trust Company v. New York Life Insurance Co. (Re Arnold Estate)*, [1919] A.C. 254, 44 D.L.R. 12 at 14; *Wilson v. Kinnear et al.*, [1925] 2 D.L.R. 641 at 646. Since there is no finding that Canon Pilcher's evidence was untruthful, the reasoning of the last-cited case is applicable. The trial judge seems to say that it was not a question how or when the plaintiff received the assignment, and that the essential fact was that he did receive it. We say that unless it is found that there was an assignment executed on 6th April 1934, the plaintiff's case must fail: *National Tobacco Co. Ltd. v. Galloway and Hastings* (1928), 34 O.W.N. 2; *Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253 at 258.

No assignment otherwise than in writing is valid, under s. 12(2) of The Copyright Act, R.S.C. 1927, c. 32. Even if the plaintiff had obtained such an assignment as he alleges, he would not be able to maintain this action, since he admits that he did not acquire the sole right to publish or authorize publication in book form, but that the composer would have to join. By s. 17 of the Act, infringement consists in doing something without the consent of the owner of the copyright, the sole right to do which is by the Act conferred on the owner of the copyright.

R. C. H. Cassels, K.C., for the defendant General Synod, appellant: This is not a dispute as to whether the plaintiff is entitled to have an assignment from Dr. Willan; the whole issue is whether or not an assignment was in fact given. Because of the wording of the Act, as between the plaintiff and the Synod there must be an assignment in writing. [ROBERTSON C.J.O.: What have you to say about an equitable assignment?]

S. 12(2) of the Act provides that the author of a work shall be the first owner of the copyright. Whatever other rights there might have been at common law, that section provides that unless the assignment is in writing, it is void. In *Performing Right Society, Limited v. London Theatre of Varieties, Limited*, [1922] 1 K.B. 539, it was held throughout the courts that it was not possible in law to assign a copyright not then in existence. Since the author is presumed to be the owner of the copyright, and there is no proof of an assignment in writing, the plaintiff has not made out a case. [LAIDLAW J.A.: Does s. 12(2) require

execution of the assignment by Dr. Willan?] Before secondary evidence can be admitted to establish this document, it must be definitely proved that the document was executed: Taylor on Evidence, 12th ed., p. 301: *Dickson v. McFarlane et al.* (1863), 22 U.C.Q.B. 539. A written instrument which is lost cannot be proved by means of a copy until it is shown that such copy is accurate: Taylor on Evidence, 12th ed., pp. 353, 354.

A second defence is that under s. 40 of The Copyright Act, the respondent's assignment, not having been registered, is void as against the Synod and against the Oxford University Press. That section imposes two conditions: (1) the earlier assignment must be registered, and (2) it must be registered before the subsequent registration or licence. The Synod and the Oxford University Press gave value to Dr. Willan for the licence to reproduce the musical composition in the Book of Common Praise. It is not clear whether the whole payment was applicable to the Merbecke or not. The respondent admits that his assignment was never registered. The Synod was a licensee for valuable consideration, and the prior assignment was unregistered. There are three kinds of notice, (a) actual notice, (b) imputed notice, and (c) constructive notice. These various types of notice are discussed in Hanbury's Modern Equity, 2nd ed., p. 43. S. 40 of the Act leaves no question that it is actual notice that is to be given, not constructive or imputed notice.

C. H. A. Armstrong, K.C., for the third party Healy Willan, appellant: This Court is in just as good a position as the trial judge to decide on the evidence. Canon Pilcher's evidence was taken on commission. [ROBERTSON C.J.O.: The trial judge did see the witnesses whose testimony conflicts sharply.] There was no evidence that any assignment in writing of the copyright in question was actually signed by Dr. Willan or delivered to the respondent. Dr. Willan intended to deliver, and understood he was delivering, the manuscript of his musical work, with certain rights of publication, to the respondent as agent for Oxford University Press. If the written permission given by Dr. Willan to Oxford University Press contains any warranty of title, this can apply only to his hymn tunes mentioned therein, and not to any part of his arrangement of Merbecke.

R. G. Agnew, K.C. (*C. H. Weir*, with him) for the plaintiff, respondent: There is nothing in the form used in copyright

registration that says whether the registrant is the owner or not. The respondent was within his rights in completing an application according to that form and registering his copyright. There is an onus cast upon the appellants to establish that we did not have title to this copyright, similar to that under s. 48(1) of The Highway Traffic Act, R.S.O. 1937, c. 288, which places the onus on the driver to show he was not negligent. This onus rests upon the appellants by virtue of s. 20(3) of The Copyright Act, and such onus has not been satisfied. The intention is to put the onus on anyone who challenges the right to the copyright. S. 20(3) makes it applicable to the respondent, although Dr. Willan is the author. [ROBERTSON C.J.O.: You do not come within subs. 3 because the author's name is there.] The word "name" includes publisher's name as well. [LAIDLAW J.A.: You specifically allege you are the owner. Is it not obligatory for you to prove that allegation, if it is an issue?] This is a case wholly depending on facts, and the evidence of the two most interested parties is before the Court, and the evidence of one must be given greater credence than the other, and the one to whose evidence more weight is attached is the person whose account best accords with ordinary practice in such cases: *H. W. Kastor & Sons Advertising Co. v. Coleman* (1905), 11 O.L.R. 262; *Lane v. Jackson* (1855), 20 Beav. 535 at 539, 52 E.R. 710. A fair summary of Canon Pilcher's evidence is that he cannot remember. Evidence of that nature cannot be accepted against a man who does remember and states facts. The trial judge properly disregarded the evidence of Canon Pilcher in favour of the respondent's evidence. [ROBERTSON C.J.O.: Where is your evidence that Dr. Willan ever executed a valid absolute assignment?] The gap is filled by Dr. Willan saying he may have signed it. [ROBERTSON C.J.O.: Dr. Willan is not a defendant; he cannot make admissions to bind anyone else.] [LAIDLAW J.A.: My difficulty is that you have not proved that Dr. Willan put his name on the assignment.] He wrote a letter which was an admission and an acknowledgment that he had signed the document. [ROBERTSON C.J.O.: Dr. Willan writing letters binds no one but himself. How could he bind the defendants?] How would it be possible, in the circumstances, for the respondent to prove that he had the assignment except in this manner? [ROBERTSON C.J.O.: How does the Court know whether the respondent has an assignment? He himself does not know

whether Dr. Willan signed the assignment. If this were an action against Dr. Willan, the position would be different. The presumptions raised in The Copyright Act are in favour of the author, not in your favour. You are not claiming by way of equitable assignment, are you? You have alleged the execution of an assignment in writing at a particular time.] Suppose a valid assignment had been made and the assignor died, if the assignment were lost, could the owner of the copyright have no remedy against the infringer of the copyright? [GILLANDERS J.A.: You must establish the existence and execution of the document.] [ROBERTSON C.J.O.: You cannot use Dr. Willan's admissions, made after these people received a licence from him, to affect their position. In 1934 you had no right to the copyright. The statute says that the assignment must be in writing, otherwise it is worthless.] There was no infringement until 1938. If the Court is of the opinion that we were not owners of the copyright, there is little more to be said. [GILLANDERS J.A.: Is there available evidence to support the fact that there was an executed assignment?] [LAIDLAW J.A.: If you rely on secondary evidence, the onus is still on you to establish that a valid assignment was executed by Dr. Willan. The respondent says the name on the document is that of Dr. Willan, but that does not prove the assignment was executed by him.] It must have been a valid assignment. There was no reason for anyone else to sign the document. Dr. Willan would surely not deny his signature. [LAIDLAW J.A.: Have you not to prove execution of the document to establish ownership even if the original is in existence? Secondary evidence does not put it on any higher ground.] [ROBERTSON C.J.O.: How are we to infer that Dr. Willan executed the assignment? He cannot make admissions binding others.] The appellants are bound by what their witnesses say, and Dr. Willan was one of them. Taking the evidence as a whole, we have established that there was an assignment properly signed by Dr. Willan.

F. J. Hughes, K.C., in reply: I refer to the article "Copyright" in 7 Halsbury, 2nd ed., at pp. 556, 557, 558; *Leyland v. Stewart* (1876), 4 Ch. D. 419; *Allen v. Lyon* (1883), 5 O.R. 615, 2 Can. Com. R. 289; *Dominion Trust Company v. New York Life Insurance Co. (Re Arnold Estate)*, [1919] A.C. 254, 44 D.L.R. 12; *Dickson v. McFarlane et al.* (1863), 22 U.C.Q.B. 539.

R. C. H. Cassels, K.C., in reply.

Cur. adv. vult.

19th July 1943. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—An appeal from the judgment of Roach J., dated 7th January 1943, after the trial of the action without a jury, at Toronto. The action is in respect of a copy-right.

John Merbecke, who lived in Tudor times, and was organist of St. George's, Windsor, set to music the office of Holy Communion, in the reign of Edward VI. The music written by Merbecke was to be sung in unison, and he wrote no accompaniment for it. There have been frequent publications of Merbecke's music, with organ accompaniment, in recent times, by musicians of high standing. Dr. Healey Willan, resident in Toronto, and eminent throughout Canada as an organist and a composer, was engaged, in 1933, in preparing an edition of this music of Merbecke's that would represent what he believed to be the proper way in which it should be sung, and in providing an organ accompaniment for it. A friend of Dr. Willan's, Canon Pilcher, now Coadjutor Bishop of Sydney, Australia, but then Canon Precentor of St. Alban's Cathedral, in Toronto, urged him to publish the edition of Merbecke's music on which he was engaged, with his organ accompaniment. This led to a discussion of the matter of a publisher. Dr. Pilcher was acquainted with the plaintiff and knew that the latter had some connection with Oxford University Press. This circumstance was attractive to Dr. Willan and a meeting was arranged at the plaintiff's shop to discuss the matter of publication. There was one meeting, and perhaps more, at plaintiff's shop, Dr. Pilcher being present with Dr. Willan. In the result the plaintiff was to have Dr. Willan's setting of Merbecke's Holy Communion music published. Some little confusion or misunderstanding existed after Dr. Willan had left his manuscript with the plaintiff, as to the relation of Oxford University Press to the publication. The plaintiff was only a sales agent for Oxford University press, and had no authority to make a contract for publication by them, and it was Oxford University Press that Dr. Willan desired as his publisher. He had had them in that relation before. Dr. Willan recalls very little of his interviews with the plaintiff, and Dr. Pilcher remembers even less, but there are letters written by the plaintiff to Oxford University Press forwarding the manuscript, and, making some allowance for the fact that the plaintiff was rather keen on having this work, particu-

larly as he suspected a competitor of trying to get it away from him, his letters written at the time indicate, at least, what he desired to have, and thought he would get. Oxford University Press were requested to have the music engraved and printed for him, and at his cost. In a second letter it is apparent that there were misunderstandings, particularly as to whether Oxford University Press or the plaintiff was to be the publisher. Dr. Willan wanted the former, but the letter says, "I am going to stand to my guns and possession is a factor that Willan cannot get around." In the third of three letters written by the plaintiff within a week, he informed Oxford University Press that after another interview with Dr. Willan and Canon Pilcher everything had been arranged to the satisfaction of all. He proceeded to say in the letter that the work, of course, would be copyrighted by him, and his own edition published in the ordinary way, the English edition to be arranged entirely by Oxford University Press. He suggested that he transfer to Oxford University Press all rights of sale in Great Britain and her colonies and all other countries excepting Canada, Newfoundland and the United States, they being the only markets he had access to. No payment was to be required for these rights, but Oxford University Press was to be responsible directly to Dr. Willan for royalties on all copies sold of the British edition.

Whether all of the foregoing was intended to be a statement of what had been agreed upon with Dr. Willan, or whether it was the plaintiff's own idea of desirable working arrangements, based upon a somewhat less definite understanding with Dr. Willan, the letter itself does not make clear. The plaintiff says, in his evidence, that "the agreement was finally agreed to that he was to assign to me all copyright and other rights for all countries which he agreed to do." Dr. Willan, in his evidence, admits that he did not greatly care about the matter, as he could not see anything in the way of financial return of any value because of other editions of Merbecke's Holy Communion on the market. However, he prepared his manuscript and, with Dr. Pilcher, took it to the plaintiff. Dr. Willan says that he understood it was to be issued by Oxford University Press, but he says that he cannot remember definitely the terms at all.

It was in July 1933 that the plaintiff wrote the letters to Oxford University Press that I have referred to. There was more correspondence with them later in the year. Proofs were

sent out for revision, and Dr. Willan revised them and made suggestions. The invoice of Oxford University Press to the plaintiff covering 1998 copies of the completed work as engraved and printed, is dated 18th January 1934, and the plaintiff made his first sales on 1st February. The cost to him was £17-1-6.

Up to this time there was nothing in writing between Dr. Willan and the plaintiff. Oxford University Press had very briefly responded to the plaintiff's first letter of July 1933, by saying, "Of course we will put Mr. Healey Willan's MS in hand, many thanks for sending it." There were also other letters later, making their arrangements with the plaintiff a little more definite. Dr. Willan, however, had not even been asked to put his arrangement in writing, or to sign anything.

The plaintiff says, in evidence, that the verbal agreement he made with Dr. Willan was not put in writing. He further says that he had an assignment in writing from Dr. Willan of all rights for all countries, but that this document is lost. The date of that assignment he says was 6th April 1934. That alleged assignment in writing is the basis of the plaintiff's title, and it is specifically pleaded in the statement of claim, and no other assignment or agreement with Dr. Willan is alleged.

There is a good deal of evidence that bears in one way or another upon the fact of this assignment in writing, and it will be necessary to consider it in some detail, and the finding of the learned trial judge as well. I defer all of that until I have stated what conduct of the defendants the plaintiff complains of in this action.

In February 1936 a committee of the General Synod of the Church of England in Canada entered into a contract with Oxford University Press for the publication by the latter of a revised Book of Common Praise. The publisher undertook, as a term of the contract, to acquire and arrange, for the use and purpose of such revised hymn book, and any and every edition thereof, the copyright of in and to such hymns and tunes as might be required for the purpose thereof. The publisher further undertook to take all necessary steps to see that the copyright of the said revised hymn book should be vested in the Synod. It was agreed that the publisher should have the sole, exclusive right to print and publish, and should print and publish and bind the revised hymn book in certain styles, sizes and

bindings, and the publisher agreed to pay to the treasurer of the Synod annually the royalties fixed by a schedule attached.

It was desired that certain tunes of which Dr. Willan was the composer, and certain parts of his setting of Merbecke's Holy Communion, should be included in the revised hymn book, and after some negotiation between a representative of the Synod's committee, and Mr. Clarke, the manager at Toronto of Oxford University Press, and Dr. Willan, the latter gave a letter, dated 15th February 1938 to Mr. Clarke giving his permission to use the desired tunes and arrangements in the revised hymn book, and stating that, so far as the writer knew, no one else had any rights in these tunes. Under some general verbal arrangement between Dr. Willan and Mr. Clarke that Dr. Willan would be fairly compensated for anything of his that was used, Oxford University Press later paid Dr. Willan 3 guineas in respect of those parts of his setting of Merbecke's Holy Communion that were used in the hymn book.

The revised hymn book was published under the agreement already mentioned, in September 1938, and it contained the parts of Dr. Willan's setting of Merbecke's Holy Communion for which Dr. Willan had given permission. There have been sales of the hymn book throughout Canada, and it can be purchased on the market, and continues to be sold. This, the plaintiff claims, is an infringement of the copyright of which he alleges that he is the owner by assignment from Dr. Willan.

The plaintiff alleges that both Oxford University Press and the General Synod had notice of his ownership of the copyright, the former by reason of the plaintiff's correspondence with it in 1933 and 1934, in regard to the separate publication of Dr. Willan's Merbecke, and the Synod by reason of the member of its committee who negotiated with Dr. Willan having had, in the negotiations, a copy of the plaintiff's publication of 1934, on which appeared the words "Copyright, 1934, by The Anglo-Canadian Music Co., Toronto, Canada."

The plaintiff brought his action in December 1940, against the Church of England in Canada, the General Synod, and Oxford University Press, claiming an injunction, damages and other relief. The Church of England in Canada was eliminated as a party to the action by a consent order. The General Synod gave a third party notice to Oxford University Press, claiming indemnity against liability to the plaintiff. Oxford University

Press gave a third party notice to Dr. Willan, claiming, in turn, to be indemnified by him against any liability in respect of the plaintiff's claim. By the judgment of the learned trial judge, the defendants are restrained from printing, publishing or causing to be printed or published, or selling or causing to be offered for sale or distribution in Canada, those parts of Dr. Willan's setting of Merbecke's Holy Communion that are included in the revised hymn book. The defendants are ordered to pay the plaintiff damages, to be fixed by reference to the Master. Oxford University Press is ordered to deliver to the plaintiff all plates used by it in printing those parts of the said musical composition already enumerated. The defendants were further ordered to pay the plaintiff's costs of the action and of the reference. The General Synod was granted indemnity from Oxford University Press for such sum as it should be required to pay the plaintiff for damages and costs, and Oxford University Press was ordered to pay the General Synod's costs of the third party proceedings between them. Dr. Willan, as a third party, was ordered to pay Oxford University Press such sum as it might be required to pay to the plaintiff or to the General Synod by way of damages and costs, and also the costs of Oxford University Press of the third party proceedings taken against Dr. Willan. Appeals are taken against this judgment by the General Synod, by Oxford University Press, and by Dr. Willan.

I shall now return to consider the question whether Dr. Willan did in fact make the assignment in writing of the copyright that the plaintiff relies upon. It is the basis of the action.

The Copyright Act, R.S.C. 1927, c. 32, as amended, provides in s. 12, subs. 1, that, subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein. Then subs. 2 is as follows:—

“The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to territorial limitations, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by license, but no such assignment or grant shall be valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorized agent.”

The plaintiff is specific in, and as a consequence, is restricted by, his evidence as to the occasion and manner of obtaining an

assignment in writing. He says he prepared the document, personally, on a typewriter, and, having prepared it, he gave it to Canon Pilcher, no one else being present, and that Canon Pilcher took it away, and a short time later he brought it back signed; that is, there was a signature on it. He was asked, "Do you know whether or not it was Dr. Willan's signature?" To this he answered, "No, I couldn't have sworn it was Dr. Willan's signature, but there was no occasion for anybody else to sign it." The signature was written in ink, but he could not swear whether there was a witness's name on the document. It was brought back to him by Canon Pilcher a few days later. The date in the document, he says, was 6th April 1934.

This document is lost, the plaintiff says. He says that he kept his "documents, assignments and so forth, in a vault in the Bank of Commerce on Yonge Street." He discontinued the box some time late in 1937 or early in 1938, and the contents were all carried over from the vault to his office, and he did not check them then, and he thinks it may have been lost in transit or after it got to the office. When he went to find it, he could not find it.

Dr. Willan flatly denies that such an incident occurred as the plaintiff describes. He admits that his recollection of his interviews with the plaintiff, in regard to the publication of his work, is vague, and while he admits that he probably would have executed an assignment of copyright to the plaintiff had he been asked to do so, he not only does not recall having done so at any time, and, to the best of his knowledge and belief, never did sign such a document, but on the question of the specific incident of signing such a document brought to him by Dr. Pilcher for signature, he definitely and emphatically denies it. The evidence of Dr. Pilcher was taken on commission at Sydney, Australia. He recalls the matter of an edition of Merbecke, and of visiting the plaintiff with Dr. Willan at the plaintiff's shop, but he has no recollection whatever of taking any document from the plaintiff to Dr. Willan. He does not remember any occasion of being present when Dr. Willan signed a document in connection with Merbecke, nor has he any recollection whatever of taking any document from Dr. Willan to the plaintiff.

The learned trial judge, in finding that there was an assignment in writing signed by Dr. Willan and delivered to the plaintiff in or about April 1934, said: "He (the plaintiff) swore with

positive conviction that it was signed and delivered to him and explained that it and other documents which at one time were kept by him in a safety deposit box in his bank were removed to his office and had been lost. Willan, on the other hand, while far from admitting that he gave the plaintiff such an assignment was not nearly as positive in his recollection of what had been done, and it seems to me that subsequent events and the part played in them by Willan are much more consistent with the plaintiff's evidence than with the theory that no such assignment had ever been given."

With respect, it seems to me that this way of putting it is, in the first place, open to two serious criticisms. The plaintiff admitted that he was not able to say that Dr. Willan signed the document that he says Dr. Pilcher brought back to him. Until it is established that Dr. Willan signed the document, it does not matter what it said. Its contents are not admissible in evidence. This is fundamental to the case. Another criticism to which the learned trial judge's statement of the matter is open, if I may say so with respect, is that Dr. Willan was just as positive as the plaintiff in his evidence regarding the incident of executing an assignment, as the plaintiff described it. Dr. Willan had not charged his memory with details of what was said in discussing with the plaintiff the matter of publication, and he said so candidly, but the execution of a formal assignment brought to him by Dr. Pilcher was a matter which he was certain did not happen, and he said so without reservation. One cannot, of course, remember things that did not happen, but one is often sure that a certain thing did not happen, or was not done in a particular way, because he knows that kind of thing would not have escaped his memory. In this instance, I assume that it would have been "out of character" for Dr. Pilcher to assume the role of the plaintiff's messenger to get a paper signed and to bring it back. That was not their relationship.

There is something to be said about subsequent events, to which the trial judge has referred. So far as the part played in them by Dr. Willan is concerned, unless it is to be considered that Dr. Willan did, in truth, remember that he had executed an assignment in writing to the plaintiff, and swore falsely that he did not remember, his subsequent conduct does not matter, for it could have no relation to an instrument of which he had no

memory. Before looking at Dr. Willan's part in subsequent events, it would be well to regard the plaintiff's.

It will be remembered that in his correspondence with Oxford University Press in July 1933, the plaintiff's proposal was that, Dr. Willan being anxious to have an edition put on the market in England, he, the plaintiff, should transfer to Oxford University Press all rights of sale in Great Britain and her colonies, and all other countries, excepting Canada, Newfoundland and the United States. He repeated this proposal in a letter of 10th October 1933. Oxford University Press accordingly got out an edition of their own, on which the plaintiff's trade-name did not appear. It would naturally be expected that, upon obtaining a formal assignment of copyright from Dr. Willan in April 1934, one of his first acts would be to regularize the position of Oxford University Press by granting them the licence he had proposed. There is nothing to indicate that he did anything whatsoever to implement his promise.

An obligation to Dr. Willan incidental to an assignment of the copyright, as the plaintiff himself states, was the payment of a ten per cent. royalty. The plaintiff made his first sales on 1st February 1934, and continued selling at least until 1941, and disposed by sale, according to his own admission, of over 800 copies, besides 400 copies distributed gratuitously by the publisher. He did not open an account in his books of his sales, or of his liability to Dr. Willan for royalties. It was not until July 1940, with this action in contemplation, that the plaintiff sent Dr. Willan a cheque for \$26.55, royalty for the past six years. To arrive at the amount, he had to hunt through his invoices, to discover, so far as he could, what sales he had made, and at what prices—for they varied—and then count the number of copies of the work still on hand, and even then he had to guess at the amount. That is not the conduct of a man as punctilious and exact as the plaintiff holds himself out to be.

The plaintiff did not register his assignment. He put nothing on the register until June 1940, almost two years after the hymn book was on the market, and he was selling it. He then had himself recorded as owner of the copyright, but with no reference to an assignment.

There is a good deal that might suggest that the story of a lost assignment is a late invention of the plaintiff's. He says that it was late in 1938 when he discovered the loss, and that

even then he was contemplating action in respect to the infringement. He must have had some appreciation of the importance of the assignment in the event of action, yet he did not then approach Dr. Willan for a duplicate. Not until September 1940, about two years later, did he apply to Dr. Willan. This was about three months after he had had himself registered as owner of the copyright, and two months after he had paid Dr. Willan the six years' arrears of royalty. This latter occasion would seem to have been an appropriate one for replacing a lost assignment, if there had been a lost assignment. Even then he was not frank about it. He wrote Dr. Willan on 11th September 1940, that on going over his assignments for audit purposes that morning he found he had mislaid the one Dr. Willan gave him in 1934 when he published his Merbecke service. He asked Dr. Willan to oblige him by signing the enclosed duplicate in both places marked.

It will be recalled that according to the plaintiff's evidence he did not type, in duplicate, the assignment in 1934. It is of interest to examine the several versions that the plaintiff drafted as duplicates of the alleged original assignment. In evidence he said, "The contents of that lost document was a regular assignment that I was to obtain, and incorporated the rights for all countries and rights of all kinds, and contained a 10 per cent. royalty and also provision for the 400 copies for distribution free of royalty." In the "enclosed duplicate" with the plaintiff's letter of 11th September 1940, no mention was made of royalties, nor of the provision for 400 copies for distribution free of royalty. There was appended to this "duplicate" a form of certificate for Dr. Willan's signature, that this was a true copy of that signed 6th April 1934. Dr. Willan returned this enclosure unsigned saying that there was no mention of royalty or percentage in it, and asking that it be completed and he would sign and return it without delay.

Another unexecuted form of assignment (Ex. 7) was produced by the plaintiff, which, at the trial, he mistakenly thought was a copy of a second form he had sent Dr. Willan with a letter dated 16th September 1940. It is no doubt, however, a second attempt of the plaintiff. It differs from the first by inserting, as part of the consideration, the words "and the further payment to me of a royalty of ten per cent per copy on each and every copy sold." Dr. Willan never had this form. He did receive with the plaintiff's letter of 16th September a third form (Ex. 9), which

contained, not only the words added in the second form, but immediately following them the additional words "after the first four hundred, which are to be free of royalty." To each of these forms is appended a form of certificate for signature, that it is a true copy of that signed on 6th April 1934.

Much is made by plaintiff's counsel of the fact that not only did Dr. Willan write the letter of 11th September, to which I have already referred, but that he actually put his signature upon Ex. 9 (in the wrong place, it is true), although he then drew his pen through it and wrote the plaintiff explaining why he did not sign and return it, as asked. It is argued that the circumstances referred to show that Dr. Willan knew he had formerly executed an assignment of the copyright to the plaintiff. To my mind the whole incident reflects much more strongly against the plaintiff.

So far as Dr. Willan is concerned, it is to be remembered that not even at the trial was he prepared to swear positively that he had never given the plaintiff an assignment in writing. He did not recall that he had. At the time of these letters in September 1940, he had not heard the plaintiff's story of making Dr. Pilcher his messenger to obtain Dr. Willan's signature. That was a specific incident that he could and did deny, when he heard of it. But in September 1940, he was at first disposed to accept the plaintiff's statement, and the date, 6th April 1934, had no special significance. The plaintiff had but lately sent him \$26.55, unsolicited, for arrears of royalty, and said that he wanted the duplicate assignment for audit purposes. Dr. Willan had no knowledge of the plaintiff's real purpose. In view of the plaintiff's willingness to vary the "true copy", Dr. Willan took time to reflect, and especially when he was not able to find that he had himself a copy of an assignment, which, according to his custom, he would have had among his papers, he stopped to make certain before committing himself to anything.

With the plaintiff, the surrounding circumstances were far different. For almost two years he had been contemplating action, and I think latterly he had been actually preparing for action. His entry, in June 1940, of his ownership of the copyright, in the register of copyrights; his belated payment, in July 1940, of royalties to Dr. Willan—royalties of which he kept no record in his books of account, and at the amount of which he had to guess—and for payment of which he had had no demand;

and, in September, his disingenuous effort to get from Dr. Willan a certified duplicate assignment, were all acts done with one constant purpose. It is plain that the plaintiff had no memory of the contents of any assignment from Dr. Willan. It was not a matter to be careless about, for he was endeavouring to obtain what doubtless was to be used by him in evidence against others. Yet he drafted three forms, and two of them he asked Dr. Willan to certify as correct copies of one original. He displayed in this matter a flexibility in respect to the truth that is not commendable. The prospect of large damages, put at \$25,000 in the statement of claim, with the General Synod of the Church of England in Canada and Oxford University Press to pay them, may have been very enticing to one who, in six years, had sold fewer than 900 copies, at 30 cents or less per copy, of a work that had cost him \$100 to print and \$26.55 for royalties.

Counsel for the plaintiff sought to attach some weight to the words "Copyright, 1934, by The Anglo-Canadian Music Co., Toronto, Canada", that appear at the foot of p. 1 of the publication. These words were, however, printed there before the date of the alleged assignment, as the plaintiff himself admits, and they can, therefore, have no bearing on the question whether or not an assignment in writing, bearing date 6th April 1934, was signed. It would be another matter if Dr. Willan has taken the position that he had had no discussion of the matter of copyright, or had refused to assign it. The printing of these words is not a requirement of the present Copyright Act, as it was under the former Act, when publication took first place, and authorship a secondary one, in a claim to copyright.

Neither the plaintiff nor any one else gave evidence that Dr. Willan had in fact signed the assignment of copyright of 6th April 1934, upon which the action is founded, and Dr. Willan denied it. I can find nothing in the subsequent events to support a presumption that Dr. Willan did in fact sign such a document, in the absence of direct evidence of the fact. It would be, at best, only by inference, and not by the evidence of any witness to the fact, that the conclusion could be reached that Dr. Willan signed the document as alleged. If the learned trial judge had had the sworn testimony of a witness to support his finding, and had accepted the evidence of that witness, that finding would have been hard to overcome. There being no such evidence, however, and the learned trial judge having, in his reasons for judgment,

overlooked both its absence and Dr. Willan's positive denial, any opinion based upon subsequent events, and the part played in them by Dr. Willan, is open to review. With respect, I am of opinion that his finding that Dr. Willan executed an assignment of his copyright, as the plaintiff alleges, should be reversed. Having regard to the conduct of both the plaintiff and Dr. Willan, it affords, in my opinion, no support for the plaintiff's contention. In this connection I should mention the submission made by counsel for the General Synod that the issue to be tried being between the plaintiff and the defendant, the conduct and the letters of Dr. Willan, subsequent to his grant of the licence or permit to use his compositions in the hymn book, were not admissible in evidence against the defendants in weighing the validity of his grant—that there was not then an identity of interest. I have not found it necessary to consider the point in view of the conclusion I have reached upon all the evidence.

This conclusion is fatal to the action as brought, and it becomes unnecessary to go into the question of notice that would otherwise arise under s. 40(3) of The Copyright Act.

A good deal was said on the argument of the appeal, and appears in memoranda submitted by counsel since, in regard to the question whether or not there was an equitable assignment under which the plaintiff can claim. The question, I think, was raised first by the Court in the course of argument for the appellants. No case of that kind is raised on the pleadings, and no such case was tried. There may be also a good deal of doubt whether, under our present Copyright Act, an action for the relief granted here can be maintained on a mere equitable assignment. I have already quoted subs. 2 of s. 12 as to the statutory requirements for a valid assignment. S. 40 no longer contains, in subs. 3, the words "no grantee shall maintain any action under this Act, unless his and each such prior grant has been registered", which were held fatal to the claim of an assignee with an unregistered assignment, in *Canadian Performing Right Society, Limited v. Famous Players Canadian Corporation, Limited*, [1929] A.C. 456, [1929] 1 D.L.R. 1. This was amended by c. 8, s. 9 of the statutes of 1931. S. 45, however, provides as follows:—

"No person shall be entitled to copyright or any similar right in any literary, dramatic, musical or artistic work otherwise than under and in accordance with the provisions of this

Act, or of any other statutory enactment for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence." This would seem to leave but little remedy to one with only an equitable assignment, for which the Act makes no provision. No doubt an equitable assignment of a chose in action results in the creation of a sort of trust on the part of the assignor for the benefit of his assignee, and a writing is not necessary to its creation. The assignor would, however, be a necessary party to such an action, and Dr. Willan is only a third party. The relief available, moreover, if s. 45 fixes its limits, would only be the restraint of a breach of trust.

In the circumstances, I have not thought it was open to the Court on this appeal to enter upon the consideration of any question resting upon, or relating to, an equitable assignment, and no opinion is, therefore, expressed upon it. An important, and possibly difficult, question necessary to be determined would be whether the parties ever agreed upon the definite terms of any assignment of the copyright, or whether they existed in the mind of the plaintiff alone.

The appeal should be allowed and the action dismissed. The defendants are entitled to their costs of action and appeal against the plaintiff. The third parties are entitled to their costs, as third parties, of the action and appeal, against the party who brought them in, respectively.

Appeal allowed and action dismissed.

Solicitors for the plaintiff, respondent: Agnew & Agnew, Toronto.

Solicitors for the defendant The General Synod, appellant: Blake, Anglin, Osler & Cassels, Toronto.

Solicitors for the defendant and third party Oxford University Press, appellant: Cassels, Brock & Kelley, Toronto.

Solicitor for the third party Healey Willan, appellant: C. H. A. Armstrong, Toronto.

[PLAXTON J.]

The City of Toronto v. Presswood Brothers.

Municipal Corporations—By-laws Restricting User of Property within Defined Area — Validity — User before Passing of By-law — The Municipal Acts, R.S.O. 1914, c. 192, s. 409(2); R.S.O. 1937, c. 266, ss. 406, 420, as amended by 1941, c. 35, ss. 13, 15.

Quite apart from the provisions of clause (b) of s. 409(2) of The Municipal Act, R.S.O. 1914, c. 192, a city council had no power, by passing a restrictive by-law under that section, to render unlawful a user of premises which was lawfully in effect at the time of the passing of the by-law. To permit such an exercise of the power given by the section would be to give a retrospective operation to the by-law, and there was nothing in the legislation making such an interpretation necessary.

The words "for any of such purposes" and "so long as it is used as it was used on that day" were correlative, and if a building was used for any of the purposes mentioned on the date in question, *e.g.*, as a factory, it was thereafter exempt from the prohibition so long as it continued to be used as a factory. It could not be said that because the nature of the product manufactured had been altered, the exemption had been destroyed.

Quaere as to the validity of a by-law purporting to repeal, as to particular premises and a specified use thereof only, a general restrictive by-law. *Beamish v. Glenn* (1916) 36 O.L.R. 10, and other authorities, applied.

Semble, where a municipality seeks an injunction to restrain a particular user of premises, basing its action solely upon the allegation that the user is in violation of a restrictive by-law applicable to the premises, it is not entitled, for the purpose of influencing any discretion which the Court may have, to adduce evidence to the effect that the user constitutes a public nuisance.

AN action for an injunction. The facts, and the precise nature of the relief sought, are fully stated in the judgment.

8th and 9th July 1943. The action was tried by PLAXTON J. without a jury at Toronto.

J. R. Cartwright, K.C., for the plaintiff.

Everett Bristol, K.C., for the defendants.

30th July 1943. PLAXTON J.:—In this action the plaintiff, the Corporation of the City of Toronto, seeks to obtain an injunction restraining the defendants, Presswood Brothers, from operating a factory and/or butcher shop at premises known as No. 1 Macklem Avenue (sometimes described as at the rear of No. 296 Gladstone Avenue) in the city of Toronto contrary (as the plaintiff alleges) to the provisions of by-law no. 7304, which was passed by the council of the plaintiff corporation on 22nd February 1915, under the provisions of The Municipal Act. In their defence the defendants (1) deny that they are using the said building as a factory contrary to the alleged by-law no. 7304; (2) plead alternatively that if the Court should deem the

defendants' use of the said building is as a factory, (a) the said building was erected and/or used for the purposes of a factory in 1913 and prior to the date of the passing of said by-law no. 7304 and has since its erection continued to be used for the purpose of a factory, and (b) the plans for the said building were approved by the City Architect and Superintendent of Building of the plaintiff prior to the passing of said by-law no. 7304. In para. 5 of the statement of defence the defendants plead in effect estoppel of the plaintiff corporation from denying the validity of city by-law no. 14703, which repealed said by-law no. 7304 in so far as the latter purported to prevent the use of the said building for the manufacture of pressed meats and sausages, or from alleging that by-law no. 7304 was applicable to prohibit the defendants from carrying on manufacturing operations in the said premises; but at the trial this plea was abandoned by counsel for defendants. The defendants accordingly ask that the action be dismissed with costs.

In support of the validity of by-law no. 7304, reliance is placed upon the provisions of s. 409, para. 2 of The Municipal Act, R.S.O. 1914, c. 192. That enactment provides:

"By-laws may be passed by the councils of cities.

2. "For regulating and controlling the location, erection and use of buildings as . . . butcher shops, stores, factories . . . and for prohibiting the erection or use of buildings for all or any or either of such purposes within any defined area or areas or on land abutting on any defined highway or part of a highway;

"(a) The by-law shall not be passed except by a vote of two-thirds of all the members of the council;

"(b) This paragraph shall not apply to a building which was on the 26th day of April, 1904, erected or used for any of such purposes, so long as it is used as it was used on that day."

The prototype of this enactment is s. 541*a* of The Consolidated Municipal Act 1903, c. 19, as enacted by s. 19 of 1904, c. 22, which was assented to on 26th April 1904. This section, with certain amendments, was carried into the 1914 revision as s. 409; and the latter section (amended in 1917 by the addition of paras. 2*c* and 2*d* by s. 18 of c. 42 of the statutes of that year) appears in the 1937 revision as s. 420. Paras. 2 to 10 of said s. 420 were repealed by s. 15(1) of 1941, c. 35, which Act, by s. 13, substituted for these and other provisions of The Municipal

Act new provisions, enacted as s. 406 of the said Act. Subs. 3 of said s. 13 provides:

“Every by-law passed for any of the purposes of any provision repealed by this Act shall be deemed to be consistent with the provisions of section 406 of The Municipal Act as re-enacted by this Act and shall remain in full force and effect until amended or repealed.”

By-law no. 7304 (Ex. 2), which recites that it was passed by a vote of two-thirds of all the members of the council of the Corporation of the City of Toronto, enacts as follows:

“I.

“No building shall be located, erected or used as, a laundry, a butcher shop, a store, a factory, a blacksmith shop, a forge, a dog kennel or hospital, or infirmary for horses, dogs or other animals, within that portion of the City described as follows:

“The district bounded on the west by the rear limit of the lots fronting on the west side of Gladstone Avenue, on the south by the north limit of Dundas Street, on the east by the rear limit of the lots fronting on the east side of Dovercourt Road and on the north by the south limit of College Street, excepting therefrom the properties fronting on the south side of College Street and on the north side of Dundas Street.

“Provided, however, that the provisions of this by-law shall not apply to any building erected or used on the 26th day of April, 1904, for any of such purposes, so long as it is used as it was used on that day.

“II.

“Any person convicted of a breach of any of the provisions of this By-law shall forfeit and pay, at the discretion of the convicting Magistrate, a penalty not exceeding (exclusive of costs), the sum of \$50 for each offence.”

The first point to be decided is whether the building in question is within the limits of the district defined in the said by-law. Counsel for defendants contended that the building is not within the said limits; on the other hand, counsel for plaintiff maintained that the said building is within the said limits. [The judgment here proceeds to a consideration of the meaning and effect of the words “The district bounded on the west by the rear limit of the lots fronting on the west side of Gladstone Avenue”, in

the light of the history of the property, and the successive subdivisions thereof, coming to the conclusion that the building in question is within the district defined by by-law no. 7304.]

The building in question was erected in 1913; permit no. 5003 issued by the Department of City Architect and Superintendent of Building on 12th June 1913, (Ex. 8), granted permission to Mr. W. H. Rodgers to erect a two-storey brick work shop on the lot in question in accordance with plans and specifications approved by said department. The building was already in existence on 22nd February 1915, the date of the passing of by-law no. 7304.

The next question that arises then is whether the said building was used as a factory and/or butcher shop at that date. The term "factory" is not defined by The Municipal Act or by by-law no. 7304. Of only negative bearing upon the scope and meaning of that term are the only pertinent decisions.

In *City of Toronto v. Foss* (1913), 27 O.L.R. 264, 8 D.L.R. 641, affirmed 27 O.L.R. 612, 10 D.L.R. 627, the use of a room in a dwelling-house by three or four persons as a sewing room was held not to be a "manufactory" within the meaning of a city by-law passed pursuant to s. 541a of The Consolidated Municipal Act, 1903, c. 19, as enacted in 1904 by 4 Edw. VII., c. 22, s. 19; in *McCormick v. City of Toronto* (1923), 54 O.L.R. 603, a restaurant was held not to be "a store or manufactory" within the meaning of a by-law of the city forbidding the erection or use in a certain area of a building for, *inter alia*, "stores" or "manufactories"; and in *Re Secure Investments Ltd. and the Township of York*, [1933] O.W.N. 602, a dairy building in which there would be machinery for pasteurization was held to be a factory. The term "factory", as used in s. 409(2) of The Municipal Act, 1914, must, I apprehend, be construed and applied in its ordinary and natural sense. Murray's New English Dictionary defines "factory", in its relevant sense, as meaning "a building or range of buildings with plant for the manufacture of goods; a manufactory, workshop; works." Webster's New International Dictionary and the Imperial Dictionary each defines factory, in its relevant sense, as meaning "A building, or collection of buildings, usually with its equipment or plant, appropriated to the manufacture of goods; the place where workmen are employed in fabricating goods, wares, or utensils; a manufactory". In harmony with these lexical definitions is the defi-

nition to be found in 38 Corpus Juris, page 970, where it is stated that "factory" has been defined as "a building, or collection of buildings, appropriated to the manufacture of goods". This digest proceeds to state as follows:

"Machinery alone does not constitute a manufactory. A manufactory is something more than a building. It includes not only the building but the machinery necessary to produce the particular goods manufactured and the engines or other power necessary to propel such machinery. It is the appropriation of a building to the manufacture of goods which constitutes it a factory."

I turn now to the evidence as to the purposes for which this building was used on 22nd February 1915, and has since been used.

Peter W. Berwick testified that he was a brother-in-law of the W. H. Rodgers who erected the building in question, and worked for him for two or three years, down to September 1914, and that Rodgers was a roofing and sheet-metal contractor, and used the basement of the building as a stable, the first floor for the storage of materials, and the top floor to manufacture such articles as eavestroughs, valleys and rainwater pipes, his raw material consisting of sheets of galvanized iron and tin and the like; that he used for this purpose hand machines such as rollers, groovers, swedgers and brakes, and employed from fifteen to twenty workmen. He further testified that Rodgers was chiefly a sub-contractor, and that the bulk of his manufactured goods, say 65 per cent., was used in carrying out his own contracts, and the rest was sold to other builders. While he had left his brother-in-law's employ in September 1914, he thought that his brother-in-law was still using the building in the manner described on 22nd February 1915, and until June or July 1915. By December 1915, his brother-in-law had lost all interest in the property.

Mrs. Pearl Clark, who has lived at 292 Gladstone Avenue for the past 35 years, testified that she had been friendly with Rodgers and had on one occasion been in the building, and that he had used it as a storage place for roofing material, and also kept his horses in the basement. Rodgers had gone overseas in the last war and the building was vacant for a number of months; later it was occupied by the Diamond Cleaners, and then still later by Ryan's candy firm; then there was a fire, and John R.

Cressy bought the property and used it for manufacturing perfumes and extracts; then at a later date it was used as a milk bottle exchange, and eventually the Presswoods had bought the property.

Arthur Yates testified that he had purchased the building in question from Olive Corson in November or December 1919 and occupied it until February 1923, carrying on there the business of Canadian Confectionery & Supply Company Limited, engaged in the manufacture of candies, chocolates and marshmallows. This company used machinery powered by an electric motor, employed from fifteen to seventeen employees, and sold its products to the retail trade.

John R. Cressy testified that he and his brother George Cressy were joint owners of the property, having bought it in 1923 from Canadian Credit Men's Trust Association Limited. At that time the building was vacant. It had been damaged by fire, and repairs were necessary in order to put the building in shape for use. They had carried on in the building the business of manufacturing toilet preparations, beauty products, and flavouring extracts. Their business was that of manufacturing chemists. They employed fifteen or sixteen employees, using in their manufacturing process mixers, grinders and powder mixers powered by electric motors. They operated this business in the building for about seven years, moving out in January 1930 to larger premises. They then leased the building to the Toronto Milk Bottle Exchange, who remained there until 1937. Their business was that of collecting bottles, sorting them, and taking them back to the dairies to which they belonged. They also repaired milk cans. They employed two men and a woman, and one or two trucks. The Cressys eventually leased the property, in 1937, to Presswood Brothers.

Presswood Brothers leased the building from the Cressys on 3rd March 1937 (Ex. 13), and have carried on there ever since the business of pork packers. They have ten employees; they buy from five to six thousand pounds of meat per day. It appears from the questions and answers which were read into the evidence from the examination for discovery of Walter H. Presswood that they manufacture sausages, wieners, and cooked meats, using for this purpose a sausage grinder and two sausage machines, powered by ten-horsepower electric motors; they also have a refrigeration machine in the basement of the building,

operated by a seven-and-a-half-horsepower electric motor, seven cookers varying in capacity from 35 gallons up to 400 gallons, as well as three tanks, also used for cooking. Steam heat is used for cooking, emanating from a steam boiler in the basement, fired with coal. Some of the meat (from 800 to 1,000 pounds) bought daily is sold directly to the retail butcher trade; the rest is processed, and about 3,000 pounds of finished products are shipped out each day.

On this evidence, having regard to the ordinary and natural meaning of the term "factory", I am disposed to conclude that the building in question was used, from the time of its erection in 1913 to June or July 1915, and has ever since that time, with some intervals of vacancy or disuse of uncertain duration, been used, as a factory within the meaning of s. 409, para. 2 of The Municipal Act, 1914.

The next question is whether the building in question, having been erected and used as a factory prior to and at the time by-law no. 7304 was passed, is subject to the prohibition enacted by the said by-law. Mr. Cartwright contended that the building was subject to the prohibition. It did not fall within the scope of the proviso set out in s. 409(2)(b), and carried into the by-law itself, in that it was not a building erected or used on 26th April 1904 for any of the purposes mentioned therein; and on the principle *expressio unius est exclusio alterius* no other buildings fell within the scope of the exemption covered by the proviso.

On the other hand, Mr. Bristol contended that the critical date was not 26th April 1904, but the date of the passing of the by-law. The by-law ought not to be construed as having a retrospective operation, and the proviso should be read as if the words were "provided, however, that the provisions of this by-law shall not apply to any building erected or used at the time of the passing of the by-law, for any of such purposes, so long as it is used as it was used on that day." He cited the judgment of Raney J. in *City of Toronto v. Phillips* (1931), 40 O.W.N. 492, in support of this construction. In that case Raney J., at pp. 493, 494, said:—

"Section 409 was amended in 1917 by 7 Geo. V. ch. 42, sec. 18, by the addition of clause 2(c), providing that the passing of a by-law under this section shall not prevent the extension or enlargement of any building used for any of the purposes men-

tioned in this section at the time of the passing of the by-law. This amendment was before the permit for the erection of the factory was granted.

“That it was not the intention of the Legislature to authorize municipal councils to interfere with factories already established seems clear from the amendment of 1917. The recognition of the right to ‘extension or enlargement’ presupposes a right of continued existence—and that right subsists in respect of ‘any building used for any of the purposes mentioned’ in sec. 409, ‘at the time of the passing of the by-law’. . . .

“Sub-clause (b) of clause 2 of sec. 409, by the effect of the amendment of 1917, should be read: ‘This sub-clause shall not apply to a building which was (on the date of the enactment of the by-law) erected for any such purposes, so long as it is used as it was on that day.’”

On other grounds I am of opinion that the prohibition enacted by by-law no. 7304 does not apply to the building in question. The argument founded upon the proviso appears to me to be one of little weight. Suppose the proviso had not been enacted at all, would it follow that it would have been within the competence of the city council to have enacted a by-law prohibiting the use, *e.g.*, as factories, of buildings which at the time of the passing of the by-law had already been erected or were being used as factories? The answer seems to me to be clearly in the negative. The proviso operates as an exemption; but exemption clauses are frequently enacted—and I think this is true of this particular exemption clause—*ex majore cautela* to quiet the fears of those whose interests may appear to be affected: see, *e.g.*, *The Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531 at 574, per Lord Herschell.

Maxwell on the Interpretation of Statutes, 7th ed., p. 5, says that “as a general principle retrospective operation ought not to be given to a statute unless the intention of the Legislature that it should be so construed is expressed in plain and unambiguous language.” At pp. 186, 187, the following appears:

“‘No rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly

capable of either interpretation, it ought to be construed as prospective only': *In Re Athlumney; Ex parte Wilson*, [1898] 2 Q.B. 547, per Wright, J. at pp. 551, 552. . . . It is chiefly where the enactment would prejudicially affect vested rights . . . that the rule in question prevails."

S. 409(2) of The Municipal Act is a power-conferring enactment. It empowers the city council to pass by-laws for the purposes therein mentioned. The rule of construction against retrospectivity of operation seems to me to be applicable *a fortiori* to such a provision. There is nothing in the terms of the enactment expressive of a legislative intention that a city council should have power to pass by-laws having retrospective operation so as to render the use of a building, already erected or used for any of the purposes mentioned in the enactment at the time a by-law is passed, unlawful.

The soundness of this construction is put in a forcible light by the decisions.

In *Rex ex rel. Rodgers v. Clark Brothers and Hughes Limited*, 34 Man. R. 521, [1924] 3 W.W.R. 689, [1925] 1 D.L.R. 49, the Manitoba Court of Appeal held that a by-law placing restrictions on the use of property could not have retroactive effect so as to prohibit the use to which property was put before the passing of the by-law, unless the authorizing legislation specifically so stated. On this ground the Court held that a by-law creating an area a residential area did not prohibit the carrying on of an undertaking business already established. Fullerton J.A. at pp. 50-51 (D.L.R.), said:

"It is inconceivable that the Legislature in authorizing the passing of a by-law declaring any highway a residential street intended to confer on the city power to interfere with the lawful user by an owner of a building already erected on that street. To confer such a power the words of a statute must be clear and unambiguous."

Prendergast J.A., at p. 53, said:

"I need not add that the statute being in restriction of civil rights—and of most elementary civil rights, as we have here—it must be most rigorously construed."

In *City of Toronto v. Solway* (1919), 46 O.L.R. 24, 49 D.L.R. 473, a by-law passed by the city council on 28th May 1912, provided that no building should be "located, erected or used for a stable for horses for delivery purposes . . . upon any of the

properties fronting or abutting on" a portion of a certain street in the city, with a proviso that the by-law should not apply to any building erected or used on the day of the passing thereof for any of the purposes mentioned "so long as it continues to be used as it was then used." The legislation under the authority of which the by-law was passed was s. 541a of The Consolidated Municipal Act, 1903, c. 19, as enacted in 1904 by 4 Edw. VII, c. 22, s. 19, and amended in 1905 by 5 Edw. VII, c. 22, s. 21. The power given was to "prevent, regulate and control the location, erection and use of buildings for," *inter alia*, "stables for horses for delivery purposes." Said s. 541a (the prototype of s. 409, para. 2) contained a proviso providing that "this section shall not apply to any buildings now erected or used for any of the purposes aforesaid so long as they continue to be used as at present" (*i.e.*, 26th April 1904).

Upon the argument before the Court of Appeal it was contended that the by-law was invalid, because, *inter alia*, it discriminated in favour of persons who after 26th April 1904, and before the passing of the by-law, had erected stables for the purposes mentioned in it, which were being used for those purposes when the by-law was passed. In rejecting this contention, Meredith C.J.O., delivering the judgment of the Court, said:

"The by-law is not, I think, open to the objection that it discriminates. It is general in its application in the future, as it applies to every one who desires to locate or to erect a building for the purposes mentioned in the by-law, and it is also general in its application to buildings previously erected which were then in use. It would, I think, have been an unreasonable exercise of the powers of the council if the by-law had made unlawful the use, for the purposes of stabling horses for delivery purposes, of buildings which had been erected and were then being used for that purpose. If the contention of the appellants were well-founded, a council which desired to exercise the powers conferred by sec. 541a in regard to stores and manufactories would be bound to make the prohibition it desired to impose applicable to buildings then in use as stores and manufactories, which would be most unjust."

In *City of Toronto v. Wheeler* (1912), 3 O.W.N. 1424, 22 O.W.R. 326, 4 D.L.R. 352, Middleton J., dealing with a by-law enacted under the authority of an amendment to s. 541 of The Municipal Act, 1903, said:

"With reference to legislation of this kind, it is, I think, a sound principle that the Legislature could not have contemplated an interference with vested rights, unless the language used clearly required some other construction to be given to the enactment."

Mr. Cartwright further contended that the words of the proviso in s. 409(2)(b) and in by-law no. 7304, "so long as it is used as it was used on that day" imply that a building (otherwise within the scope of the exemption conferred by the proviso, because erected or used for one of the purposes mentioned in s. 409(2)(b)) should be continuously used for the same purpose in order to retain the benefit of the exemption; and if at any time the building ceased to be so used, it would then become subject, as regards future user, to the prohibition of the by-law. He argued that the building in question, even if originally not subject to the prohibition of by-law no. 7304, because it was used as a factory for the manufacture of roofing materials at the time the by-law was passed, had subsequently ceased to be used as a factory for such purpose, and thereupon became subject to that prohibition. He would not, however, push his argument to the length of suggesting that the building would cease to have the benefit of the exemption merely because for some intervals of time it was vacant or in disuse between periods of occupation under the several leaseholds. His real point, as applied to the building in question, was that if the building was a factory at the time by-law no. 7304 was passed, and, therefore, exempt from the prohibition enacted by that by-law, it was a factory for the manufacture of roofing materials; and, having afterwards ceased to be used for that purpose, and put in use for a different purpose, *i.e.*, a factory for the manufacture of meat products, it ceased to be exempt from, and became subject to, that prohibition. In my opinion, the construction upon which this contention is predicated is too narrow. In s. 409(2)(b) the words "any of such purposes" and the words "so long as it is used as it was used on that day" are correlative. It is the use of the building for one of the purposes mentioned in s. 409(2) that is important. One of the purposes so mentioned is that of a "factory". The decisive question, then, is, aye or no, Has the building ever ceased to be used as a "factory"? The building, though used for the manufacture of roofing materials, and, therefore, as a factory, at the time

by-law no. 7304 was passed, did not, in my view, cease to be used as it was used at that time, namely, as a "factory", merely because it was afterwards devoted to or used for the manufacture of other and different kinds of commodities. It is surely none the less a factory, and, if otherwise not subject to the prohibition of by-law no. 7304, still retains the benefit of that exemption.

By-law no. 14703 passed 15th March 1937, purported to repeal by-law no. 7304 in so far as it applied to prevent the manufacture of pressed meats and sausage in the building in question. Mr. Cartwright argued that the by-law was invalid. Mr. Bristol, on the other hand, supported its validity. The conclusion at which I have arrived relieves me of the necessity for dealing with the point. However, I feel bound to say that if the said building were subject to the prohibition enacted by by-law no. 7304, and the defendants' right to use the building as a meat factory depended solely upon the effect of by-law no. 14703, I would entertain grave doubt as to its validity. That prohibition must, I should think, be of general application within the district and to all buildings to which it applies; and it is, I apprehend, beyond the competence of the city council to single out one particular building within that district, to which the general prohibition is otherwise applicable, and extend to it exceptional or discriminatory treatment. Under s. 409(2), "The council is to act and determine in a general way and by by-law, not in a particular instance and by permit": per Riddell J. in *Beamish v. Glenn* (1916), 36 O.L.R. 10 at 18, 28 D.L.R. 702. See also *Cridland v. City of Toronto* (1920), 48 O.L.R. 266 at 268, 55 D.L.R. 384; *Forst v. City of Toronto* (1923), 54 O.L.R. 256 at 278, 279; *City of Toronto v. Mandelbaum*, [1932] O.R. 552 at 556, [1932] 3 D.L.R. 604; *Re Joy Oil Co. Ltd. and the City of Toronto et al.*, [1937] O.R. 243, 67 C.C.C. 325, [1937] 1 D.L.R. 541; *City of Toronto v. Elias Rogers Co.* (1914), 31 O.L.R. 167 at 176, 178, 19 D.L.R. 75.

On the assumption that the plaintiff had successfully proved that the building in question was erected or used in contravention of by-law no. 7304, Mr. Cartwright contended that the plaintiff was entitled as of right to an injunction under s. 525 of the present Municipal Act. Mr. Bristol argued that the Court had discretionary authority to grant or withhold an injunction, citing

in support of this contention the judgment of Raney J. in *City of Toronto v. Phillips* (1931), 40 O.W.N. 492.

In the event that I should conclude that the granting of an injunction under said s. 525 was discretionary, Mr. Cartwright indicated his desire to introduce the evidence of different persons living in the neighbourhood of the building in question to prove (as I understood) that the meat factory operated in the building was a local nuisance. The object of leading such evidence would be to show that this was a case in which the Court's discretion ought to be exercised in favour of granting an injunction. I see no basis in the pleadings for the introduction of such evidence. The plaintiff corporation does not allege that the meat factory is a public nuisance. It alleges simply that the building is used contrary to by-law no. 7304. However, the conclusion at which I have arrived upon the other issues renders it unnecessary for me to express any opinion upon the point.

The action is dismissed with costs.

Action dismissed with costs.

Solicitor for the plaintiff: C. M. Colquhoun, Toronto.

Solicitors for the defendants: White, Ruel & Bristol, Toronto.

[COURT OF APPEAL.]

Martin v. Deutch et al.

Trials—Jury Trial—Motion to Strike out Jury Notice—Discretion of Judge in Chambers—Appeal—Principles Applicable—Rule 398—The Judicature Act, R.S.O. 1937, c. 100, s. 55.

Where a judge in chambers makes an order, under Rule 398, striking out a jury notice, he exercises a judicial discretion, and his order is not a final determination of the matter, since clause 2 of the Rule expressly preserves the right of the judge presiding at the trial to determine finally whether the case is one which should be tried without a jury. It follows that the Court of Appeal should not interfere with an order made upon such a motion, unless it is of opinion that the order is clearly wrong, or will result in a denial of justice.

The plaintiff, in an action for damages for personal injuries, recovered \$165,000 at a trial before a judge and a special jury. The judgment was later set aside, and a new trial was ordered, limited to the assessment of damages. Before the hearing of this appeal the plaintiff launched an action against the defendants' insurer, under s. 205 of The Insurance Act, R.S.O. 1937, c. 256. This action was stayed until the disposition of the appeal. Considerable newspaper publicity was given to all these proceedings. On a motion to strike out the jury notice for the second trial, Greene J. was of opinion that the cumulative effect of these and other circumstances was enough to make it undesirable that the action should be tried by a jury, and accordingly made the order asked. Rose C.J.H.C. granted leave to appeal, being of opinion that there was good ground to doubt the correctness of the decision, and that the matter was of sufficient importance to justify the granting of leave. On appeal, *held*, Fisher J.A. dissenting, the appeal should be dismissed, since it could not be said that Greene J. was clearly wrong.

Per Laidlaw J.A.: Appeals of this nature should not be brought except in clear cases: *Gardner v. Jay* (1885), 29 Ch. D. 50 at 57; *Mayhead v. Hydraulic Hoist Company, Limited*, [1931] 2 K.B. 424 at 441. When they are brought, the burden is on the appellant to satisfy the Court of Appeal that the judge below was clearly wrong.

AN appeal, by leave of Rose C.J.H.C., from the order of Greene J. striking out a jury notice.

The action was one for damages for personal injuries, the claim being for \$200,000. At the first trial, before Chevrier J. and a special jury, the plaintiff was awarded \$165,000. An appeal from this judgment was dismissed, [1942] O.W.N. 583, [1942] 4 D.L.R. 529. The defendants appealed to the Supreme Court of Canada, which ordered a new trial, limited to the assessment of damages, [1943] S.C.R. 366, [1943] 3 D.L.R. 305.

Before the disposition of the appeal to the Supreme Court of Canada, the plaintiff launched an action against the defendants' insurer, under s. 205 of The Insurance Act, R.S.O. 1937, c. 256. This action was stayed until the disposition of the appeal: *Martin v. The Travelers Indemnity Company*, [1943] O.W.N. 28, [1943] 1 D.L.R. 567.

15th June 1943. The defendants moved to strike out the jury notice, and the motion was heard by GREENE J. in chambers at Toronto.

F. J. Hughes, K.C., for the defendants, applicants.

B. O'Brien, for the plaintiff, *contra*.

GREENE J. (orally, at the conclusion of the argument):—
The case has some extraordinary features. It was tried in June of 1942, at the city of Toronto, when the plaintiff was awarded damages in the sum of \$165,000, which, it is stated, is the largest verdict for damages arising from personal injuries ever given in the Province of Ontario. The case, of course, received great newspaper notoriety at that time and has received much newspaper publicity since then from certain circumstances which will be referred to shortly.

The defendants, desiring to appeal to the Supreme Court of Canada, were refused a stay of execution by the Court of Appeal for Ontario, and shortly afterwards the plaintiff took action against The Travelers Indemnity Company under the provisions of The Insurance Act in that regard, to recover the sum of \$50,000, being insurance carried by the defendant Deutch with that Company.

In due course the appeal by the defendants reached the Supreme Court of Canada, which directed a new trial as to the amount of damages. Needless to say, all these proceedings, in a case which attracted great attention from the beginning, have kept it before the public mind.

The usual rule, where it is thought that the defendant will be injured by a reference to insurance before a jury, is to allow the plaintiff to elect to continue the trial without a jury or go over to the next sittings for trial before a jury chosen from a new panel. That rule, it seems to me, is based on the nature of the incident which has happened in most of the cases of that nature, namely, an inadvertent reference by a witness to insurance, which does not receive any undue newspaper publicity, so that consequently there is no reason to apprehend that a new panel chosen at the next sittings will have any particular knowledge of the incident which caused the dismissal of the first jury.

The circumstances are so different here that it seems to me that it would be impossible, within a space of even years, to

empanel a jury in the city of Toronto which would not very shortly during the trial, if not before the trial, have knowledge that the defendants were insured in the sum of \$50,000 and also have knowledge of the previous verdict in favour of the plaintiff in the unusual sum of \$165,000.

It is far from my intention to say that the mere fact that a second jury would have knowledge of the amount awarded by the first jury is sufficient to prejudice the defendants to such an extent that the plaintiff ought to be deprived of his ordinary right to a jury. It does seem to me, however, that the almost inevitable knowledge of the large sum of insurance, and the verdict by the previous jury, would create a situation in which the ordinary juror would have very great difficulty in approaching the case without being unduly influenced by such knowledge.

It is suggested in the notice of motion, and I believe the record supports the contention, that the medical evidence is so intricate and extensive that the jury might have considerable difficulty in getting a true appraisal of the same, and further difficulties are suggested in the dissenting judgment of Henderson J.A. in the Court of Appeal, where the verdict of the jury was sustained by the majority of the Court. (See [1942] O.W.N. 583 at 586, [1942] 4 D.L.R. 529).

For these reasons, I am of the opinion that the circumstances indicate that justice would be better served by a trial by a judge without a jury.

Costs of the motion to be costs in the cause.

25th June 1943. The plaintiff's motion for leave to appeal was heard by ROSE C.J.H.C. in chambers at Toronto.

E. A. Richardson, K.C., for the plaintiff, applicant.

F. J. Hughes, K.C., for the defendants, *contra*.

ROSE C.J.H.C. (orally):—The point that Greene J. had to decide is perhaps a new one, or to some extent a new one. The motion was based upon several suggestions of reasons why the plaintiff's statutory right under s. 55 of The Judicature Act—subject to the Rules, of course, and to the discretion of the trial judge—to have his case heard by a jury, should be taken from him. I think it can be said with some confidence that no one of those suggestions in itself would have been sufficient. The authorities seem to go that far. But the learned judge, as I understand his reasons, thought that the cumulative effect

of these points suggested was such as required him to say that the action was one that ought to be tried without a jury. Having reached that conclusion he was bound by Rule 398 to direct that the damages should be assessed without a jury. The question, as I see it, that will have to be determined if an appeal is had, is whether he was right in coming to the conclusion that the cumulative effect of the points or the matters discussed by him was what he held it to be. Now it is in that sense that I say that the question that he had to determine was more or less a new question.

The question as to the effect of the knowledge of the jury of the amount claimed, or, in this case, previously awarded, is not a new question. Neither is the question as to insurance a new question. Neither is the question as to intricate medical evidence a new one. Neither is the question as to the complexity of accounts and the effect of taxation upon earnings referred to in the judgment of Mr. Justice Henderson in the Court of Appeal a new one. But no judge, so far as I am aware, has had previously to determine what ought to be done in a case in which there are combined the probable knowledge of the jury of the amount claimed and of the amount previously awarded and of the insurance, and with those the complicated medical evidence and the question as to the method of computing what the plaintiff's earnings would have been in the future had he not sustained the injuries.

I hesitate to make any suggestion as to what I think I should have done had I been in my learned brother's place, but I do not see how, without doing so, I can indicate the reasoning by which I have arrived at the conclusion at which I have arrived. A condition of granting leave to appeal in circumstances such as those of this case is that there appears to the judge hearing the application to be good reason to doubt the correctness of the order in question. When there is a previous decision that seems to the judge hearing the application to indicate that the order in question is, or may be, wrong, his course is easy; but in a case like this, where the dependence must be not upon the application of particular cases but of general principles, I do not see how he is going to come to a conclusion as to whether there is reason, or good reason, to doubt the correctness of the order in question except by trying to put himself in the place of the judge whose order is in ques-

tion and asking himself what he would have done in the circumstances.

Now, perhaps I take an old-fashioned and exaggerated view of the importance of preserving the right of litigants in common law cases to have a trial by jury if they so desire, and, perhaps, holding the view that I do, I am more loath than some, or, perhaps, the majority of judges, to interfere with the right and to dispense with the services of the jury. But one has got to have a certain amount of confidence in one's own judgment, and my opinion at the moment is that I should not have thought, had I been hearing the motion, that the cumulative effect of all the reasons put forward for striking out the jury notice was likely to be so great as to warrant interference with the plaintiff's right to have his damages assessed by a jury. My brother Greene recognized that ordinary right of a plaintiff, and the fact that it was not lightly to be interfered with, but he came to the conclusion that the scale was turned when all the matters that he discussed were considered. I think, as I have said, that I should not have come to the same conclusion. So thinking, I have some reason to doubt the correctness of the order in question. Whether I have good reason to doubt it is another matter. But I feel reasonably sure that the incorrectness of the order is at least arguable, and, while I am not prepared to go so far as to say that I think the order is wrong, I think that I am bound to go so far as to say that I think there is a good reason to doubt its correctness. That being so, I ought to grant the leave if the proposed appeal involves matters of such importance that, in my opinion, leave to appeal should be given.

As to the parties themselves, the matter is, or is thought to be, of considerable importance; otherwise it would not have been argued with such vigour as it has been. And I think it is of general importance. There is a good deal of uncertainty existing in the practice as regards striking out jury notices, whether in chambers or at the trial, and I think the time is ripe for consideration of the practice by the Court of Appeal. I realize that the decision of the Court of Appeal in any one of these cases is a decision upon the particular facts of the particular case, and may not be of much assistance to a judge who has to decide another case upon other facts. But, when you get a case like this which, in the sense that I have mentioned,

seems to be new, I think that, other things being equal, it is just as well that the Court of Appeal should have an opportunity of considering it, and so I think that I ought to say that the proposed appeal involves matters of such importance that, in my opinion, leave should be given.

There are one or two matters discussed by Mr. Hughes to which I ought to refer specifically. He has cited many cases which seem to establish the fact which, perhaps, does not need to be supported by cases at all, that when a judge acts in the exercise of his discretion his action is not lightly to be interfered with, and, indeed, that, practically, it ought not to be interfered with unless it appears clearly that he was wrong. As to that argument I think I might repeat what I tried to say at the time, that, in my opinion, I am not concerned here with any question as to whether Greene J. was clearly wrong. The Court of Appeal, even if they think that there is ground for saying that there is good reason to doubt the correctness of his order, may say that, while that doubt exists, the order is not so clearly wrong as to warrant the setting of it aside. But I do not think, as I have said, that the question as to whether the order is clearly wrong arises on this motion.

The other point, which is always made in these motions, is that under Rule 398(2) an order made in chambers striking out a jury notice does not interfere with the right of the judge presiding at the trial to direct a trial by jury. The judge presiding at the trial, in other words, is declared to have the power, notwithstanding what the judge in chambers has done, to proceed to try the case with a jury. But, as regards cases in Toronto, that declaration of the trial judge's power is, I think, illusory. If the jury notice is struck out in chambers, the action must be set down to be disposed of at the non-jury sittings, and the judge at the non-jury sittings, whatever he thinks about the desirability of a trial by jury, cannot try the case with a jury because he has no jury available. It is conceivable that he might, having directed a trial by jury, send the case to be set down at the assizes, but that would be an unseemly practice in which no judge would indulge. So the result is, that if a case comes to him at the non-jury sittings, whatever he may think about the desirability of a trial by jury, he will pretty nearly be driven to keep his thoughts to himself and proceed to try the case in the way that has been directed in chambers. So, 1

think that, while theoretically this order of Mr. Justice Greene's has very little effect, it is in reality a final order in that it has determined the mode in which the damages are to be assessed, and that the argument based upon its lack of finality and, therefore, on its lack of importance, is not one that can prevail.

For these reasons, which the Rule tells me to state shortly, and which, I am afraid, I have stated at undue length, I grant the leave that is asked. The costs of this motion will be costs in the appeal.

13th September 1943. The appeal was heard by ROBERTSON C.J.O. and FISHER and LAIDLAW JJ.A.

T. N. Phelan, K.C., for the plaintiff, appellant: The origin of the rule of practice as to non-disclosure of the fact of insurance to the jury is, for Ontario, *Loughead v. Collingwood Ship-building Company* (1908), 16 O.L.R. 64, affirmed 12 O.W.R. 697. The correct view of the rule is given in *Mitchell v. Heintzman* (1913), 23 O.W.R. 763, 4 O.W.N. 636, 9 D.L.R. 20. The inference to be drawn by the jury from the fact of the plaintiff's second action, against an insurance company, might equally well be that the plaintiff himself was insured against accident, and was seeking to recover indemnity. I refer also to *Fillion v. O'Neill*, [1934] O.R. 716, [1934] 4 D.L.R. 598. Since that case, the settled practice is that we must wait until there has been some reference, before the jury, to the fact of insurance, and then the plaintiff is given his election, either to have the action traversed or to go on before the judge alone.

The existence of insurance here is wholly immaterial. The liability of the defendants is not in issue, and the jury, if they know anything about insurance, will know that if the defendants are insured at all, they have protection up to \$50,000. The damages may reasonably be expected to exceed that amount.

The order of Greene J. is not a discretionary one: Rule 398 [ROBERTSON C.J.O.: Do not the words "it appears to him" import a discretion?] I submit not. [LAIDLAW J.A.: Is an order made in chambers in any different position from one made on the same matter by the trial judge?] Not so far as the right of appeal is concerned. As to appeals from discretionary orders, I refer to *Evans v. Bartlam*, [1937] A.C. 473, and *Griggs v. Petts*, [1940] 1 K.B. 198.

The medical evidence, and the question of taxation referred to by Henderson J.A. in his dissenting judgment on the former appeal, are not so difficult that a jury cannot properly appreciate them.

The Supreme Court of Canada must have contemplated that the new trial ordered by it would be before the same forum. Greene J. had no right to anticipate the matters which may arise before the jury. If such circumstances do in fact arise, the trial judge is empowered, under Rule 398, to deal with them.

F. J. Hughes, K.C., for the defendants, respondents: The order appealed from is not properly the subject of appeal: *Cornish v. Boles* (1913), 4 O.W.N. 1551, 24 O.W.R. 877, 12 D.L.R. 245. The matter is a procedural one, which should be disposed of in the High Court: *Goderich Manufacturing Co. v. St. Paul Fire and Marine Insurance Co.* (1918), 13 O.W.N. 443; *Henderson v. Henderson* (1916), 38 O.L.R. 97 at 101; *Cooke v. Temiskaming and Northern Ontario Railway Commission*, [1939] O.W.N. 521.

The order is clearly a discretionary one, and should not be reversed unless it is "clearly wrong": *Lauder v. Didmon* (1894), 16 P.R. 74; *Ex parte Merchant Banking Company of London*; *In re Durham* (1881), 16 Ch. D. 623 at 635; *Gardner v. Jay* (1885), 29 Ch. D. 50.

T. N. Phelan, K.C., in reply: The judgment of the Supreme Court of Canada in *Logan v. Wilson*, not yet reported, shows that even the decision of a trial judge on this question is reviewable. Our right to a trial with a jury is one which should not lightly be interfered with, and the onus is on the respondents, because of our statutory right, to show that Greene J. was right.

Cur. adv. vult.

22nd September 1943. ROBERTSON C.J.O.:—This is an appeal by the plaintiff from the order of Greene J., dated 15th June 1943, striking out the jury notice given by the plaintiff. The order was made in chambers under Rule 398. The appeal was taken by leave granted by the Chief Justice of the High Court.

The action is for \$200,000 damages for personal injuries sustained in a motor-car accident. There has been one trial of the action, with a jury, when the plaintiff was awarded \$165,000 damages. A new assessment of damages has been ordered by the Supreme Court of Canada, the judgment at the

trial upon the question of the defendants' liability to pay damages remaining undisturbed.

A number of matters were put forward by the defendants in support of the contention that the action is one that ought to be tried without a jury. It is said that the large sum awarded by the jury at the former trial gave the case wide-spread notoriety, and that another jury will have knowledge of it, and will likely be influenced thereby. Defendants are substantially insured, and it is said that that fact, and even the amount of insurance, was also given wide publicity, and is likely to be known to any new jury. Further, it is said that the evidence of doctors, as to the plaintiff's injuries and their consequences, is of a nature that a jury will not be able to understand and weigh properly, and, as a still further matter beyond the capacity of a jury to deal with properly, there are the question of taxation as it bears upon large incomes such as the plaintiff had at times received, and the complex problem of estimating the plaintiff's loss in the circumstances.

All these matters were presented to Greene J., and while that learned judge did not give them all equal prominence in his reasons for judgment, and perhaps some of them did not weigh with him as heavily as others, he was definitely of the opinion that the case was one that should be tried without a jury.

It is plain from the terms of Rule 398, that the judge in chambers is intended to exercise his discretion. He is to direct that the issues shall be tried and the damages assessed without a jury when "it appears to him that the action is one which ought to be tried without a jury". Doubtless, the discretion is to be exercised juridically. The judge is not to dispense with a jury because he does not believe in juries. Neither is he to disregard substantial grounds for dispensing with a jury for no other reason than his high regard for the right of a litigant to have his case tried by a jury. The Rule plainly contemplates that it may be applied, and that a jury may be dispensed with, in an action of a class that is ordinarily tried with a jury, if there are special circumstances that make it appear that it will be in the interest of justice to try the case without a jury. Whether there are, in the particular case, special circumstances that warrant a judge in chambers directing a trial without a jury, is a matter upon which that judge must exercise his discretion.

The rule also plainly contemplates that the order of the judge in chambers striking out a jury notice, or refusing to strike it out, shall not, of necessity, be a final determination of the mode of trial. Clause 2 of the rule expressly provides otherwise, and preserves to the trial judge the right to direct whether the trial shall be with a jury or without a jury. The trial judge will have the same right to determine whether the assessment of damages in this case will be made by a jury, or by him without a jury, whether we affirm the order of Greene J. or reverse it.

These considerations, in my opinion, make it undesirable that this Court should interfere with the order of a judge in chambers made under Rule 398, except in a clear case, for the order is not only a discretionary one, but it does not finally determine the mode of trial, and the expression of an opinion on that matter by the Court of Appeal may be embarrassing to the trial judge when he comes to determine it finally.

I find myself unable to say that the order of Greene J. is clearly wrong. Even if I had definitely concluded that, if I had been in his place, I should have made a different order—and I have not reached that conclusion—that would not warrant me in saying that this Court ought to set his order aside. He had a right, and a duty, to exercise his discretion—to decide the matter as it appeared to him. It does not appear to me that the circumstance of the former trial, with a very large award of damages, and the public notice that the exceptionally large verdict was given, would afford sufficient ground for refusing the plaintiff a jury on a new assessment. I think it is right to assume that a jury will try to observe its oath and to give a verdict according to the evidence before it. Neither does it appear to me that it is probable that a jury will render an unjust verdict because it has become known generally that a large amount of insurance was carried by the defendants. While it is, no doubt, a wholesome practice to exclude all mention of insurance at the trial of a motor accident case, I think most jurymen know that owners of motor cars are commonly insured for substantial amounts.

None of the other matters that have been instanced as likely to make the assessment of damages in this action unsuitable for determination by a jury, appear to me to be, in themselves, so unusual or so difficult to understand and apply that it can be said that they are beyond the scope of a jury to deal with. Still,

there are these several factors in the situation, and each of them may become the source of some trouble with a jury. I am not prepared to say that Mr. Justice Greene was wrong in concluding that, looking at the case as a whole, it was one that ought to be tried without a jury. The verdict of one jury in this case has been set aside, and, in the opinion of the majority in the Supreme Court of Canada, "the jury took a biased or mistaken view of the whole case." That circumstance, while, in my opinion, it would not be a proper ground for an order by a judge in chambers striking out a jury notice—and there is nothing to indicate that Mr. Justice Greene so regarded it—may well be borne in mind by the Court of Appeal in considering whether it can prudently say that the discretion vested in the judge in chambers was not reasonably exercised in directing that the new assessment should be made without a jury.

The appeal should be dismissed with costs to the defendants in any event of the cause, including costs of the motion for leave to appeal.

FISHER J.A. (*dissenting*):—This appeal by the plaintiff from an order made by Greene J. in chambers, striking out the jury notice, raises for determination a question of first importance to the profession and to litigants in actions for damages caused by negligence. To understand and determine the question involved, it is necessary to state the following facts:

The plaintiff's action for negligence was tried in June 1942, by Chevrier J. and a special jury called by the plaintiff. The jury awarded the plaintiff \$165,000 damages. An appeal was taken to the Court of Appeal and dismissed; and on a further appeal to the Supreme Court of Canada, that Court, in May 1943, directed a new trial limited only to the quantum of damages. Before a second trial could be had, the defendants moved before Greene J. in chambers, in June 1943, to strike out the jury notice and presumably that means the notice served in the action that had been tried.

Because of the fact that the large verdict awarded, and also the fact that the defendant W. G. Deutch carried \$50,000 indemnity insurance, was published at and after the trial in newspapers in Toronto, Greene J. was of opinion, as stated in his reasons, that it would be impossible within a space of even years to empanel a jury, in Toronto, which had not very shortly dur-

ing, if not before the trial, had knowledge of the amount of the insurance and of the verdict, and that such knowledge would create a situation in which the ordinary juror would have very great difficulty in approaching the case without being unduly influenced by such verdict and a knowledge of the insurance, and also by the fact that a jury would have difficulty in understanding the medical evidence in estimating the amount of damages the plaintiff is entitled to receive.

Rose C.J.H.C., in his reasons on the application for leave to appeal, said that he had grave doubts that the "cumulative effect" of the reasons relied on by Greene J. for striking out the jury notice was likely to be so great as to warrant interference with the plaintiff's right to have his damages assessed by a jury, and, expressing doubt as to the correctness of the order, and viewing the matters involved in the appeal as being important, granted leave to appeal.

It was argued on the appeal to this Court that the order of Greene J., being a discretionary one, should not be set aside unless it could be said that it was made on a wrong principle and a failure of justice.

The reasons of Greene J. are, with great respect, in my opinion, in so far as they relate to the large verdict and the insurance, based on conjecture only and not on fact, in that if a new jury is hereafter empanelled some one or all of the panel *might* have read in the newspapers published in Toronto about a year and a half ago, referring to the case, about the verdict and insurance, and that such reading *might* influence them to render a verdict not in accordance with the evidence. I am at a loss to understand the right of a judge sitting in chambers, in the exercise of his discretion, to prejudge the minds of the jury—and especially the minds of a special jury—on supposition or conjecture only. Who knows now whether any one or all of a jury empanelled had ever read a word about the verdict or the insurance in the newspapers, and if they did that they would remember a year and a half afterwards anything about it, and even if one or more had read about it, who knows now, notwithstanding the oaths they had taken, that they would be unduly or wrongly influenced? The view I take is that a jury, being a judicial fact-finding tribunal and the sole judge of the facts, is entitled to the same respect as a presiding judge whose function is to instruct the jury as to the law, and that

an order made by a judge in chambers in the exercise of his discretion, based, as I have stated, on supposition or conjecture only, which has the effect of taking from a plaintiff his common law right to have his case tried by a jury, which the plaintiff has in this case, is clearly wrong.

It is perfectly obvious that the defendants are anxious to get this case away from a jury because they are afraid of it, and if the Court is also afraid to entrust this case to a judicial fact-finding tribunal—and especially to a special jury—it means that the Court has no confidence in the integrity and intelligence of a jury.

This leads me to say that on the one hand we have in our jurisprudence practically all of our judges at assize courts eulogizing the jury system and all that it stands for, and on the other hand a failure to trust them.

The Supreme Court of Canada was of opinion that as the case had gone to the jury as if the plaintiff was totally incapacitated in his earning power for the rest of his life, a new trial should be had, limited to the amount of damages, and that, I think, meant a new trial before a jury, as formerly, otherwise it is only reasonable to assume that the Court, having the medical and all the other evidence before it, would have made a direction for the new trial to take place before a judge alone. The argument that the medical evidence is so intricate and extensive that a jury might have considerable difficulty in getting a true appraisal of the same, in my opinion, has no merit. I have read the medical evidence with care and I am unable to find in it anything intricate or technical, and in my opinion it can be quite easily understood by a jury and is evidence much the same as that given in thousands of like actions tried before a jury. Had Greene J., on the application to him, referred the matter to the trial judge, and had it appeared to the trial judge, as the evidence developed, that the case should be tried without a jury, no one, I think, would quarrel with his discretion so exercised. I have not considered it necessary to discuss the many cases cited on the argument, having to do with expense, delays, multiplicity of appeals and the interference by the Court of Appeal with the exercise of a judicial discretion, because in my view all those cases have little or no application when applied to the particular facts of this particular case. In my opinion the order

of Greene J. is wrong and the plaintiff is entitled to have his action tried as it was formerly tried, that is, with a jury.

LAILAW J.A.:—The plaintiff appeals, by leave of the Honourable the Chief Justice of the High Court, from an order made by Greene J., dated 15th June 1943, whereby a jury notice delivered in this action by the plaintiff was struck out.

The claim in the action is for damages alleged to have been caused by negligence of the defendants. The plaintiff took the necessary steps to have the case come to trial before a special jury. It was then found that the defendants did not satisfy the onus of proof upon them and the damages sustained by the plaintiff were assessed at \$165,000. Judgment for the plaintiff was entered in accordance with the findings of the jury and an appeal therefrom to this Court was dismissed. On further appeal to the Supreme Court of Canada it was ordered that a new trial be had in the cause, but such new trial is to be limited to the issue of damages sustained by the plaintiff: *Deutch et al. v. Martin*, [1943] S.C.R. 366, [1943] 3 D.L.R. 305. The defendants thereupon made application under Rule 398 for an order striking out the jury notice.

It will be convenient to reproduce Rule 398, as follows:

"398.—(1) When an application is made to a Judge in Chambers for an order striking out a jury notice, and it appears to him that the action is one which ought to be tried without a jury, he shall direct that the issues shall be tried and the damages assessed without a jury, and in case the action has been entered for trial shall direct the action to be transferred to the non-jury list.

"(2) The refusal of such an order by the Judge in Chambers shall not interfere with the right of the Judge presiding at the trial to try the action without a jury. Nor shall an order made in Chambers striking out a jury notice interfere with the right of the Judge presiding at the trial to direct a trial by jury.

"(3) The Judge presiding at a jury sittings in Toronto, may in his discretion strike out the jury notice and transfer the action for trial to a non-jury sittings, and this power may be exercised notwithstanding that the case is not on the peremptory list for trial before the said Judge."

I state at once my conclusions in respect to the effect and construction of the Rule:

(1) It is the duty of a judge in chambers, and he is required by the Rule, to decide the question whether an action ought to be tried without a jury.

(2) Such decision requires the exercise of a judicial discretion vested in the judge to whom the application is made.

(3) The decision so made is capable of review by the Court of Appeal in a proper case.

(4) The Court of Appeal ought not to interfere unless it is satisfied that there is likely to be a failure of justice.

(5) The burden of so satisfying the Court rests on the appellant.

(6) Appeals of this kind ought not to be brought except in clear cases.

The right to trial with a jury arises at common law and is preserved to parties in dispute by statute. But it is expressly provided that the right is exercisable "subject to the rules": The Judicature Act, R.S.O. 1937, c. 100, s. 55. Thus the Rules of Practice are ancillary to, and must be read with, the statute. It follows that the right is not absolute; the exercise of it is controllable by a judge in chambers and ultimately by the judge presiding at the trial of the action.

Rule 398 was passed on 23rd December 1911. The object was to remedy unsatisfactory conditions causing expense and delay incident to placing non-jury actions on the jury list: *Wise v. Canadian Bank of Commerce*, 52 O.L.R. 342, [1923] 3 D.L.R. 1163. It also is a matter of substance and importance that the mode of trial should be ascertained at the earliest possible time in the course of proceedings: *Lauder v. Didmon* (1894), 16 P.R. 74 at p. 78; *St. Andrew's College v. Taylor* (1922), 23 O.W.N. 171. The function of the Rule continues and cannot be properly performed if there be unnecessary delay in making application to the Court to decide in what manner the case ought to be tried, or if a judge hearing such an application avoids a decision of the question by referring the matter to the judge presiding at trial. It might at times be most difficult for a judge in chambers to answer the question with confidence and satisfaction. There are unquestionably cases in which it is very hard to fully anticipate the nature of the evidence to be given at trial, and a judge in chambers may be perplexed by his position of disadvantage as compared to the judge seized of the case at trial. Nevertheless he must solve the question in the particular

case before him to the best of his ability, in accordance with the facts submitted for his consideration, and as dictated by his personal experience and skill. His judgment is not final and conclusive, and the ultimate responsibility of determining the question rests on the trial judge as provided by the Rule. I think the Rule puts on a judge in chambers a duty to decide each and every application made to him, and if he decides that the action is one that ought to be tried without a jury, he is bound to give the direction as provided: *Bissett v. Knights of the Maccabees* (1912), 3 O.W.N. 1280, 22 O.W.R. 89, 3 D.L.R. 714; *Gerbracht v. Bingham* (1912), 4 O.W.N. 117, 23 O.W.R. 82, 7 D.L.R. 259; *Flynn v. Capital Trust Corporation* (1922), 22 O.W.N. 523; *Wise v. Canadian Bank of Commerce, supra*; *Foster v. The Prudential Insurance Company of America*, [1941] O.R. 145, [1941] 3 D.L.R. 598, 8 I.L.R. 163.

There are no hard and fast rules to guide a judge in reaching a decision of this kind. He must exercise a judicial discretion. That means he may use his personal wisdom and experience to find what is fair and equitable in the peculiar circumstances of the case before him. He is allowed a liberty and privilege to act in accordance with what he believes to be right and proper; he is to be guided by the spirit of justice, and his decision is not compelled by fixed principles and precedents in law. The decision to be made, as stated in the Rule, depends on what "appears to him"; but, of course, it ought to be deliberate and judicial and must not be an arbitrary, vague or capricious use of power.

An order striking out a jury notice, made by a judge in chambers, is not final. It is subject to review by the trial judge, as expressly provided in the Rule, and he is empowered finally to determine the mode of trial notwithstanding a previous direction. It may be that in some circumstances the exercise of the power by a trial judge at a non-jury sittings might occasion postponement and delay in the trial, but such a possibility does not alter my view as to construction of the Rule and the procedure contemplated under it. Also, in a proper case and by special leave obtained pursuant to the Rules of Practice pertaining thereto, the decision of the judge in chambers may be reviewed by the Court of Appeal: *Conmee v. Canadian Pacific Railway Company* (1886), 12 O.A.R. 744; *Wise v. Canadian Bank of Commerce, supra*. While such power exists under our practice it is quite

clear in my view that the Court should not examine the way in which the judge in chambers has exercised his discretion, "unless satisfied that there is likely to be a failure of justice if we do not": per Lindley L.J. in *Mangan v. Metropolitan Electric Supply Company*, [1891] 2 Ch. 551 at p. 553; *Stone v. Kohen*, 57 O.L.R. 579, [1925] 4 D.L.R. 728. There might be such a failure of justice if the judge below proceeded on a wrong principle or an erroneous view of the facts: *In re Martin*; *Hunt v. Chambers* (1882), 20 Ch. D. 365; *Foster v. The Prudential Insurance Company of America*, *supra*, or if the order be clearly wrong, but before the Court interferes in the matter, "There must be some special reason to induce it to do so": per Jessel M.R. *In re Martin*; *Hunt v. Chambers*, *supra*, at p. 369.

I think, too, that the burden of satisfying the Court of Appeal that it ought to reverse an order of a judge in chambers in such a matter rests on the appellant. The discretion of the judges in the Court of Appeal is not to be substituted for that of the judge in chambers to whom the personal privilege is given by Rule 398. It is not intended that their opinions shall govern and prescribe the manner in which the issues in the action shall be tried, but the function of the Court in such a matter is to remedy any injustice made apparent to it. It lies on him who contends that such an injustice has been done, by reason of the decision of the judge below, to satisfy the Court that the order should be set aside.

It follows from what I have said that in my opinion appeals of this kind should not be brought, except in clear cases: *Gardner v. Jay* (1885), 29 Ch. D. 50 at 57; *Mayhead v. Hydraulic Hoist Company, Limited*, [1931] 2 K.B. 424 at 441. It is generally not desirable for the Court of Appeal to examine and review the reasons of a judge below who has exercised in a judicial manner a discretion entrusted to him. There may be good reasons to doubt the correctness of his decision, but that alone is not sufficient ground on which this Court should interfere, and they can be dealt with under the procedure provided by clauses 2 and 3 of Rule 398. Moreover such a review would be embarrassing to the exercise of the final discretion given to the judge presiding at the trial: *Wise v. Canadian Bank of Commerce*, *supra*.

In this appeal the Court should not interfere with the order made by Greene J. It has not been shown by the appellant that

any injustice is likely to result from a failure to do so, and the appeal, therefore, ought to be dismissed with costs to the defendants in any event of the cause, including costs of the motion for leave to appeal.

Appeal dismissed with costs, FISHER J.A. dissenting.

Solicitors for the plaintiff, appellant: Phelan, Richardson, O'Brien & Phelan, Toronto.

Solicitors for the defendants, respondents: Smily, Shaver, Adams, DeRoche & Fraser, Toronto.

[COURT OF APPEAL.]

Quirouette v. Quirouette.

Divorce—Jurisdiction of Court—Jurisdiction Not Affected by Naming of Place of Trial—Effect of Naming Wrong Venue—Rules 184, 245(d), (e).

The jurisdiction of the Supreme Court of Ontario is not, under the Rules of Practice and Procedure, dependent upon the case being tried in any particular county, and Rule 245(d), providing that in matrimonial causes the place to be named as the place of trial shall be the county town of the county in which the plaintiff resides, does not affect the jurisdiction of the Court. Rule 184, providing for relief against irregularities, can be invoked in matrimonial causes as well as in others to cure an improper naming of the place of trial. It follows that the fact that a plaintiff names, as the place of trial, a place other than the county town of the county in which he resides, and sets the case down for trial at the place so named, does not deprive the Court of jurisdiction, and the plaintiff may be given relief, if his case is otherwise made out, and it does not appear that the wrong place of trial was named in order to avoid publicity, *Fairbanks v. Fairbanks et al.*, [1937] O.W.N. 154, discussed; *Winn v. Winn and Fisher* (1938), 46 Man. R. 78, distinguished.

AN appeal from the judgment of GREENE J., set out *infra*. The facts are fully stated in the judgment.

14th September 1943. The appeal was heard by ROBERTSON C.J.O. and FISHER and LAIDLAW JJ.A.

H. A. Coon, for the plaintiff, appellant.

No one for the defendants, respondents.

At the conclusion of the argument, THE COURT delivered judgment orally, allowing the appeal, with costs throughout. The following written reasons were subsequently delivered:

24th September 1943. ROBERTSON C.J.O.:—This is an appeal from the order of Mr. Justice Greene, dated 3rd May 1943, on the trial of the action before him at Ottawa.

The action is for divorce, brought by the wife against her husband and the co-respondent. No appearance or defence was entered in the action for either defendant, and they did not appear at the trial. The statement of claim alleged that the plaintiff is a married woman, with permanent residence in the city of Ottawa, in the county of Carleton, but temporarily residing at number 6 Prospect Avenue in the city of Toronto, in the county of York. Ottawa was named in the statement of claim as the place where the plaintiff proposed that the action should be tried.

When the case came on for trial at Ottawa before Greene J., on 3rd May 1943, evidence was given on behalf of the plaintiff that would seem to make out a good case for the relief claimed, but as, in the opinion of the learned trial judge, it appeared from the plaintiff's evidence that she had not, for some years prior to the commencement of the action, resided in the county of Carleton, he was of the opinion that he could not try the action at Ottawa, because of the provisions of Rule 245. That Rule, after providing that the plaintiff shall, in his statement of claim, name the county town at which he proposes that the action shall be tried, provides, in clause (d), as follows:—

"In matrimonial causes, if the plaintiff is resident in Ontario the place to be named shall be the county town of the county in which the plaintiff resides."

The learned trial judge therefore endorsed the record as follows:—

"The evidence of the plaintiff establishes she is not a resident of the County of Carleton; consequently, under Rule 245, there is no jurisdiction to try the action."

The formal order issued reads in this way, after a formal recital:—

"This Court doth order that as the plaintiff is not resident in the County of Carleton as required by Rule 245, the action is not properly before the Court and no judgment can be rendered in the action as at present constituted."

The plaintiff was married at Ottawa on 11th May 1931. She has resided in Ottawa since she was fourteen years of age, and her husband had always lived in Ottawa. About three years after their marriage, they moved to Bonfield, near North Bay. About two months later they separated, and the husband returned to Ottawa, where he has ever since resided. The plain-

tiff, after the separation, went to Kirkland Lake, and since then she has lived at Timmins and at North Bay, supporting herself by working, and having no permanent residence at any of these places. Early in 1942 she came to Toronto and obtained work in a factory there. She was in Toronto when the writ was issued and the statement of claim was filed in March 1943. A boy, the only child of the marriage, born in 1932, has had his home with the plaintiff's sister in Ottawa, and the plaintiff says that she has made frequent visits to Ottawa throughout the period of her separation to see the boy. The plaintiff appears to have considered that Ottawa was her residence, or, as she expressed it, her "home town".

We are not prepared to disagree with the conclusion of Mr. Justice Greene that the plaintiff does not reside, and has not for a long time resided, in the county of Carleton, of which Ottawa is the county town. We are, however, unable to agree that the action is, in any way, improperly constituted, or that there was any lack of jurisdiction to try the action when it came before him at Ottawa, merely by reason of the fact that the provision of Rule 245 had not been complied with. Non-compliance with the Rule does not render an action or proceeding void (Rule 184). The naming of Ottawa as the place of trial here was only an irregularity which, under Rule 184, may be amended or otherwise dealt with as may seem just: *Atwood v. Hall* (1924), 27 O.W.N. 86. In a matrimonial cause, as in any other cause, Rule 184 may be applied, and the Court should deal with any irregularity in the proceedings as may seem just: *Fletcher v. Fletcher et al.*, [1935] O.R. 27.

There can be no doubt about what is just and proper in the circumstances of this case. Ottawa was, in every sense, except for the requirement of Rule 245, the place where this action should be tried. Both defendants lived there. The plaintiff herself had lived there, and her people were there. There is no ground for suggesting any improper motive in naming Ottawa, rather than Toronto or North Bay, or some other remote place, as the place of trial. Ottawa was not named as the place of trial to escape publicity, or to avoid knowledge of the proceeding by persons to whom the parties were known, and who also had knowledge of their mode of life. Reasons of that kind were present in the case of *Fairbanks v. Fairbanks et al.*, [1937] O.W.N. 154, where Kingstone J. refused to re-

gard a divorce action as properly before him for trial, when the plaintiff, who resided in the county of Welland, brought his action down for trial at the city of Hamilton in the county of Wentworth. The plaintiff in that case stated, in his evidence, that the reason for the trial being held in Hamilton and not at Welland was for the purpose of avoiding undue publicity in the county in which he resided. A Manitoba case of *Winn v. Winn and Fisher*, 46 Man. R. 78, [1938] 1 W.W.R. 674, [1938] 2 D.L.R. 475, was also referred to in the discussion before Mr. Justice Greene. It was there held that where suit for divorce was instituted in a judicial district other than the district in which the defendant resided or the cause of action arose, the Court acquired no jurisdiction. That decision was based upon a Rule that applied to the institution of the action, and not to a proceeding in an action already duly launched. There is no occasion for discussing, for present purposes, the soundness of that decision. The jurisdiction of the Court, under the Rules of this Province, is not dependent upon the case being tried in any particular county. Clause (e) of Rule 245 says, "The action shall be tried at the place so named, unless otherwise ordered upon the application of either party." If the plaintiff in the present case had named Toronto or North Bay as the place of trial, an order could be made in the action changing the place of trial to Ottawa, and no doubt such an order would have been made, even on the plaintiff's own application, if Ottawa had not already been named as the place of trial. The defendants were not only served with the statement of claim, naming Ottawa as the place of trial, but they were also personally served with notice of trial at Ottawa. There has been no objection on the part of either defendant, and under all the circumstances the proceedings should be validated, and the plaintiff should have the usual order *nisi*.

*Appeal allowed and judgment nisi directed;
costs throughout to plaintiff.*

*Solicitor for the plaintiff, appellant: H. Augustus Coon,
Toronto.*

[COURT OF APPEAL.]

Snell v. Alteman.

Costs—Scale—Supreme Court Action—Effect of Apportionment of Damages under The Negligence Act, R.S.O. 1937, c. 115, s. 3—Amount actually Recovered within Competence of County Court—Powers of Taxing Officer—Rules 649, 651.

Courts—Jurisdiction of County Court—Personal Actions—The County Courts Act, R.S.O. 1937, c. 103, s. 19.

Where a plaintiff, suing for damages for negligence, is awarded damages which the jury assesses at \$1,000, but which, because of the findings of the jury as to contributory negligence, are reduced, by the operation of s. 3 of The Negligence Act, to \$500 in the formal judgment, the plaintiff is nevertheless entitled to his costs on the Supreme Court scale. The fact that the County Court could have tried the action if the defendant had not objected, under s. 19 of The County Courts Act, does not make the action "of the proper competence" of the County Court, and Rule 649 is therefore inapplicable.

Although the taxing officer cannot, under Rule 649, enter upon any inquiry as to the amount involved in the action, yet he has ample power, under Rule 651, to determine whether or not the action was within the competence of an inferior court. He is therefore not bound to tax costs strictly upon the amount awarded by the formal judgment. *McIlhargey v. Queen* (1911), 2 O.W.N. 916, 18 O.W.R. 763, considered.

AN appeal, by leave of Greene J., from the order of Barlow J., [1943] O.W.N. 413, allowing an appeal from the certificate of the acting Taxing Officer at Toronto. The facts are fully stated in the judgments now reported.

20th September 1943. The appeal was heard by RIDDELL, KELLOCK and LAIDLAW JJ.A.

H. F. Parkinson, K.C., for the plaintiff, appellant: Rule 649 is intended to punish plaintiffs who improperly bring defendants into a higher court, and it is not applicable here. Had we admitted that we were negligent up to 50 per cent., and sued only for \$500, we would have been within the jurisdiction of the County Court, but could only have recovered \$250: *Anderson v. Parney*, 66 O.L.R. 112, [1930] 4 D.L.R. 833. The wording of s. 19(1)(b) of The County Courts Act, R.S.O. 1937, c. 103, is identical with that of the section of The Division Courts Act (now R.S.O. 1937, c. 107, s. 54(1)(a)) considered in the *Anderson* case. The jurisdiction of the County Court is limited to \$500 precisely in the same way as that of the Division Court is limited to \$120. *Anderson v. Parney* was followed in *Parker v. Hughes*, [1933] O.W.N. 508, which is conclusive authority for the position now taken by us. The decision of the acting Taxing Officer was proper, and should not have been disturbed.

T. N. Phelan, K.C., for the defendant, respondent: The scale of costs must be determined according to the amount of the judgment. An application was made to the trial judge for an "order to the contrary" under Rule 649, and this was refused. How can the taxing officer exercise a discretion which the trial judge refused to exercise? [KELLOCK J.A.: Rule 651 provides that the taxing officer may make all necessary inquiries. He is entitled to ascertain whether the action was within the jurisdiction of an inferior court]. The jurisdiction of the County Court is clear. The amount recovered, not the amount claimed, is the determining factor on taxation, unless the trial judge makes an "order to the contrary": *Harrison v. The Joy Oil Co. Ltd. et al.*, [1938] O.R. 679 at 683, [1938] 4 D.L.R. 360, 71 C.C.C. 77. [LAIDLAW J.A.: How could the plaintiff have sued in the County Court and recovered \$500? If, in order to bring himself within s. 19(1)(b) of the Act, he had reduced his claim to \$500, and the jury had then found him 50 per cent. negligent, he could have recovered only \$250]. The provisions of The Negligence Act, R.S.O. 1937, c. 115, as to contributory negligence, are designed to provide the defendant with a defence to liability. [KELLOCK J.A.: The Plaintiff's recovery is reduced, because of his contributory negligence, by the operation of the statute, not because of any defence]. [LAIDLAW J.A.: Is not s. 3 of The Negligence Act placed there for the very purpose of meeting such a situation as you suggest?]

Division Court jurisdiction and County Court jurisdiction are quite differently defined. S. 19(7) of The County Courts Act provides adequate protection for the defendant if too much is claimed. It is the plaintiff's privilege to select his forum, and if he had brought this action in the County Court, the defendant would have had to decide whether or not to dispute the jurisdiction, the risk as to costs then being upon him. Here the plaintiff, by choosing to sue in the Supreme Court, has created any problem which may exist.

H. F. Parkinson, K.C., in reply, referred to *Everly v. Dunkley* (1913), 5 O.W.N. 65, 25 O.W.R. 29.

Cur. adv. vult.

27th September 1943. RIDDELL J.A.: I agree with LAIDLAW J.A. and have nothing to add.

KELLOCK J.A.: This is an appeal from an order of Barlow J. in chambers, dated the 10th day of June 1943, allowing an appeal by the respondent from the certificate of the acting Taxing Officer at Toronto, upon the taxation of costs pursuant to the judgment in the action.

The action was brought by the appellant for damages for personal injuries sustained in a highway accident. The appellant's damages were assessed by the jury at the sum of \$1,000, but owing to the finding of the jury that the appellant and the respondent were equally to blame, judgment was entered for the appellant in the sum of \$500 with costs.

The taxing officer taxed the costs on the Supreme Court scale, but by the order in appeal this ruling was held to be erroneous and the costs were directed to be taxed on the County Court scale, with a set-off. It was held that the action was within the competence of the County Court, the governing factor being the amount finally recovered, and that therefore Rule 649 applied.

The question for determination upon the appeal is as to whether or not this action is of the "proper competence" of the County Court.

It is said on behalf of the respondent that this action was of the proper competence of the County Court because, while the appellant's damages have been assessed at the sum of \$1,000, he was never entitled to recover from the respondent more than the sum of \$500. It is said also that the appellant ought to have commenced his action in the County Court because, if the respondent did not object to the jurisdiction as required by subs. 2 of s. 19 of The County Courts Act, R.S.O. 1937, c. 103, that court would have had jurisdiction, and if the respondent did object, provision is made by subss. 2 to 7 for transfer to the Supreme Court, with ample directions as to costs.

There are many cases, of course, in which the amount recovered governs the quantum of costs. It is well settled that a plaintiff may not avoid the application of Rule 649 by claiming in the higher court an amount beyond the jurisdiction of the inferior court, where he fails to prove a claim beyond the jurisdiction of the inferior court: *Moffatt v. Link* (1910), 2 O.W.N. 56, 16 O.W.R. 984. There are many similar cases.

There are, however, other cases in which the amount recovered is not the test as to the applicability of the Rule. An

illustration is to be found in *Everly v. Dunkley* (1913), 5 O.W.N. 65, 25 O.W.R. 29. In that case the plaintiff was successful as to a claim for an amount which was beyond the jurisdiction of the County Court but which was reduced by a set-off to an amount within the jurisdiction. The set-off had not been assented to by the parties before action and it was held, in consonance with earlier authorities, that a plaintiff having a claim against which a defendant may, if he pleases, set up a set-off, must sue in the superior court, for he cannot compel the defendant to set up his claim, and he cannot by voluntarily admitting a right to set-off confer jurisdiction upon the inferior court. It was accordingly held that the costs ought to be taxed on the High Court scale. *Everly v. Dunkley* follows an earlier decision of Middleton J. (as he then was) in *Caldwell v. Hughes* (1913), 4 O.W.N. 1192, 24 O.W.R. 498, 10 D.L.R. 788, to the same effect. It is to be observed that at the time these two last-mentioned cases were decided, the statute contained substantially the same provisions as are now to be found in subss. 2 to 7 of s. 19.

Two other cases are relevant.

In *Anderson v. Parney*, 66 O.L.R. 112, [1930] 4 D.L.R. 833, an action had been brought in a Division Court to recover \$120 damages for injury to the plaintiff's motor vehicle. The defendant's negligence was found to be solely responsible for the plaintiff's damage, and judgment was entered for the plaintiff for the full amount with costs, but this was altered on appeal, and the plaintiff was held to have been guilty of contributory negligence to the extent of 40 per cent. The evidence disclosed that the plaintiff had, in fact, suffered damages of \$196.50, but it was held that the amount of the plaintiff's damages to be considered was the amount recoverable in the action, namely \$120 for which he had sued. In the course of his judgment (p. 117) Masten J.A. said that in reference to the Division Court " . . . the jurisdiction of the Court . . . is limited by the size of the transaction, or, in other words, by the amount of the damages which the plaintiff must prove in order to have a recovery of the balance claimed. If the plaintiff, in making a case necessary to entitle him to recover a balance of \$120, is obliged to establish a claim for more than \$120, he ousts the jurisdiction of the Court, as it seems to me."

In *Parker v. Hughes*, [1933] O.W.N. 508, this Court, following the *Anderson* case, held that a plaintiff who, in his claim,

accepts some responsibility for his own negligence, and reduces that claim accordingly, is merely in the position of having abandoned that portion of his claim, and the claim is subject to further reduction under the provisions of The Negligence Act, upon the basis of his admission.

In the case at bar the appellant has proved a claim in excess of the jurisdiction of the County Court, as defined in s. 19(1)(b). By reason of the operation of s. 3 of The Negligence Act, R.S.O. 1937, c. 115, the amount of his recovery has been reduced. Had the appellant before action correctly estimated his damage at the amount ultimately assessed by the jury and sued for that amount, the claim would have been beyond the jurisdiction of the County Court apart from the operation of the later subsections of s. 19. If in order to keep his claim within the limits of s. 19(1)(b) he had reduced the claim to the amount to which he has been found entitled after the jury passed upon the degrees of negligence, all he would have been entitled to recover is \$250. It seems clear that such an action is not an action within the proper competence of the County Court. Is it correct to say that the action was within the competence of the County Court when, had the appellant originally sued for \$1,000 in that court, it was open to the respondent to require its transfer to the Supreme Court on the ground that it was not? In my opinion such a proposition is not sound.

It seems to me that the case at bar is within the principle of the decisions in *Everly v. Dunkley*, *supra*, and *Caldwell v. Hughes*, *supra*. In my opinion the principle applicable still may be expressed in the language of Burns J. in *McMurtry v. Munro* (1856), 14 U.C.Q.B. 166 at 171, although the Act then under consideration is not in the same terms as that now in force. The passage is as follows:

“ . . . if a plaintiff's demand is to be reduced by an application of some legal principle, or the effect of a state of facts to be proved, and which the law applies independent of the acts or agreements of the parties, then there is no jurisdiction, and in such latter case the moment the plaintiff's demand in proof reaches the amount specified as the jurisdiction, the court can go no further.”

It is by reason of the operation of the provisions of The Negligence Act upon the plaintiff's proved claim of \$1,000 that recovery of the full claim is prevented, and in my opinion the

County Court did not have jurisdiction to adjudicate upon that claim. I further think, as already indicated, that the presence of subss. 2 to 7 of s. 19 does not affect the principle.

It was further argued on behalf of the respondent that the taxing officer was precluded from entering upon any inquiry under Rule 649, and that he could do no more than look at the formal judgment and be governed entirely by the amount thereby disclosed, and reliance was placed upon the decision in *McIlhargey v. Queen* (1911), 2 O.W.N. 916, 18 O.W.R. 763.

It would require a strong decision to overcome what appears to be the express provision of Rule 651. Further, the decision relied upon does not deal at all with costs which are subject to the operation of Rule 649, and the statement of Middleton J. (as he then was) that "There is no jurisdiction in the Taxing Officer to enter upon an inquiry under Con. Rule 1132 as to the amount involved" has reference to costs which are not the subject of that Rule at all. Consolidated Rule 1132 is the predecessor of the present Rule 649.

For these reasons I would direct that the appeal should be allowed and the certificate of the acting Taxing Officer restored with costs.

LAIDLAW J.A.: An appeal by leave of Greene J. from an order made in Chambers by Barlow J., dated 10th June 1943.

The claim made by the plaintiff in this action is for damages for personal injuries sustained in an accident on a highway on 16th October 1942, and alleged to have been caused by the negligence of the defendant. The trial was with a jury. The jury assessed the total damages sustained by the plaintiff at \$1,000 and found that the degree of negligence attributable to the defendant was fifty per cent., and that the same percentage was attributable to the driver of the motor vehicle in which the plaintiff was riding. Judgment for the plaintiff was entered in accordance with the findings of the jury for \$500, and the Court ordered that the plaintiff "do recover from the defendant his costs of this action forthwith after taxation thereof."

The acting taxing officer held that Rule 649 has no application, and taxed the costs of the plaintiff on the Supreme Court scale. On appeal to Barlow J. it was held that the costs should have been taxed and allowed on the County Court scale and subjected to a set-off as provided in Rule 649.

It will be convenient to reproduce Rule 649, as follows:

"649. Where an action of the proper competence of a County Court is brought in the Supreme Court, or an action of the proper competence of a Division Court is brought in the Supreme Court, or in a County Court, and the Judge makes no order to the contrary the plaintiff shall recover only County Court costs, or Division Court costs, as the case may be, and the defendant shall be entitled to tax his costs of suit as between solicitor and client; and so much thereof as exceeds the taxable costs of defence which would have been incurred in the County Court or Division Court, shall, on entering judgment, be set off and allowed by the Taxing Officer against the plaintiff's County Court or Division Court costs to be taxed, or against the costs to be taxed and the amount of the verdict if it be necessary; and if the amount of costs so set off exceeds the amount of the plaintiff's verdict and taxed costs, the defendant shall be entitled to execution for the excess against the plaintiff."

The question to be decided is whether this action is "of the proper competence of a County Court" within the scope and meaning of the Rule.

The jurisdiction of the County Court in a case of this kind is defined in s. 19(1) of The County Courts Act, R.S.O. 1937, c. 103, as follows:

"19. (1) The county and district courts shall have jurisdiction in,—

"(b) personal actions, except actions for criminal conversation and actions for libel, where the sum claimed does not exceed \$500."

A defendant may dispute the jurisdiction of the County Court on the ground that the action is not within the proper competence of the Court "because of the amount claimed" and a procedure is set forth in s. 19(2). If no dispute is made in the manner stipulated the question of jurisdiction cannot afterwards be raised or the jurisdiction be brought in question unless ordered by the Court or a judge. The effect of this provision is to preclude a defendant from bringing the jurisdiction of the Court into question without special permission so to do. No jurisdiction is expressly conferred on the County Court to entertain actions of this kind where the sum "claimed" exceeds \$500. The statute does not provide "that an action may be brought in a County Court where a larger amount is claimed"

as stated by Barlow J. That is a practice adopted in many cases on behalf of plaintiffs, without authority and for reasons known best to their counsel. I think it should not be encouraged even in cases where counsel for the defendant is willing to submit to proceedings in the lower court. In any event, the "competence of a County Court" is not to be ascertained by s. 19(2) and the special cases covered thereby. It is to be determined by reference to s. 19(1) (b), and the proper interpretation of the words therein used, *viz.*, "where the sum claimed does not exceed \$500." Is the word "claimed" to be read in this kind of case as synonymous with the word "recovered"? If so, a plaintiff, as in this instance, found to be fifty per cent. at fault in a negligence action in the County Court must claim \$1,000 in order to recover \$500. Likewise, a plaintiff found to be ninety-nine per cent. at fault cannot recover \$500 unless the sum claimed be \$50,000. Again, if the jury assess the damages sustained by the plaintiff at the sum of \$1,000 and divide the degree of negligence equally between the parties, the County Court has jurisdiction to entertain the action, but if the jury, in the exercise of its discretion, find the plaintiff forty-nine per cent. at fault the County Court has no jurisdiction because the amount recovered in such a case exceeds the sum of \$500. Thus, on such a construction, counsel considering and advising on the question of the proper competence of a County Court must with minute accuracy predict the degree of negligence which the Court or jury on all the evidence submitted at the trial may find against each party. Such foreknowledge is denied even to the most skilled and learned member of the profession of law, and clients are entitled to more than a guess for a fee. No speculation, uncertainty, or difficulty, is encountered if the words "the sum claimed" be read to mean "the sum in dispute" in the action. The sum in dispute is the amount of damages as ascertained by the judge presiding at trial or by a jury; in a negligence action it is not the amount recovered by the plaintiff after reduction of the amount of damages in proportion to the degree of fault or negligence on his part. It is urged that on this construction a plaintiff can commence an action in the Supreme Court and recover only an amount within the jurisdiction of the County Court or Division Court, but nevertheless be entitled to costs on the scale of the Supreme Court. But the Court has ample power under The Negligence Act "to direct that the plaintiff

shall bear some portion of the costs if the circumstances render this just": R.S.O. 1937, c. 115, s. 7. Although this power has not been exercised to my knowledge, nevertheless it is available and may be used in the discretion of the learned judge presiding at trial to secure justice in the particular circumstances of any case at trial before him.

I have read the cases referred to by Barlow J. and by counsel. I do not find any of them to be in conflict with the views I have expressed. On the contrary, it appears that these views are amply supported. In *Anderson v. Parney*, 66 O.L.R. 112, [1930] 4 D.L.R. 833, the amount in controversy was the maximum sum a plaintiff could claim in a Division Court. The Court declined "to consider any damages the plaintiff may have had or the evidence disclosed he had, beyond that amount": per Fisher J.A. at p. 116. Masten J.A., at p. 117, makes it plain that the jurisdiction of the Court is limited "by the amount of the damages which the plaintiff must prove in order to have a recovery of the balance claimed." See also *Parker v. Hughes*; [1933] O.W.N. 508. The cases of *Moffatt v. Link* (1910), 2 O.W.N. 56, 16 O.W.R. 984, and *Harrison v. The Joy Oil Co. Ltd. et al.*, [1938] O.R. 679, [1938] 4 D.L.R. 360, 71 C.C.C. 77, are distinguishable because the amount of damage proved by evidence was the same as the amount recoverable by the plaintiff. The amount so proved was the amount in controversy and properly governed the question of the competence of the court.

The taxing officer cannot enter upon an inquiry under Rule 649 as to the amount involved in the action. But under Rule 651 he is expressly empowered to "make all inquiries necessary to determine whether an action is within the competence of an inferior Court." He did not in this case exceed the powers given to him. The amount involved in the action was not put in question. It was determined by the finding of the jury that the amount of damages sustained by the plaintiff was \$1,000. The taxing officer simply ascertained the facts upon which he decided that this action was not within the competence of the County Court and that Rule 649 has no application to this case. I think he was right. The order of Barlow J. should, therefore, be reversed and the appeal allowed with costs.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: Parkinson, Gardiner & Willis, Toronto.

Solicitors for the defendant, respondent: Phelan, Richardson, O'Brien & Phelan, Toronto.

[LAIDLAW J.A.]

McPherson v. McPherson and Reynolds.

*Divorce—Discretion of Court—Refusal of Cohabitation by Plaintiff
Wife—Desertion—Conduct Conducive to Adultery—Connivance—
The Marriage and Divorce Act, R.S.C. 1927, c. 127, s. 5.*

Where a wife, without reasonable excuse, refuses to cohabit with her husband, or to have sexual intercourse with him, her conduct amounts to wilful desertion or separation from him, and the Court, in its discretion, may refuse to grant her a divorce, notwithstanding proof of the husband's adultery. Further, such conduct may be considered as conduct conducive to the husband's adultery, thus furnishing an additional ground for refusing relief. The discretion of the Court, under s. 5 of The Marriage and Divorce Act, R.S.C. 1927, c. 127, is unfettered, although it must be exercised judicially and not arbitrarily, and the Court may refuse a divorce even if all the statutory conditions are satisfied and there is no finding of collusion, connivance or condonation, in the circumstances set out in that section.

AN undefended action, by a wife, for dissolution of marriage.

1st October 1943. The action was tried by LAIDLAW J.A. without a jury at Toronto.

E. H. Dewart, for the plaintiff.

No one for the defendants.

18th October 1943. LAIDLAW J.A.:—The plaintiff married the defendant McPherson at Oshawa, Ontario, on 22nd October 1938, and now asks for a dissolution of the marriage on the ground that her husband is guilty of adultery, alleged to have been committed by him with the defendant Reynolds on 19th March 1943. The marriage was consummated, and the parties lived together as husband and wife until November 1942. The plaintiff then demanded that the husband leave their home, and he did so. She told him she did not want him to return home. Her reason was that she "felt that sexual intercourse with him would take place and it would be painful" to her. She says, "I asked him if he would remain away rather than come home, because it was not very pleasant for me having him come home at night," and told him "if he did come home he was not to have sexual intercourse" with her. They did not live together after the separation, but they met in December. At that time, as

a result of certain reports she had received, she asked him "if he had been keeping company" with the defendant Josephine Reynolds. He admitted that he had. There is no evidence that she endeavoured in any way to dissuade him from a continuation of that relationship, or that she was willing to change her attitude towards him. In January 1943 she consulted a solicitor and engaged the services of two men to watch the conduct of her husband. On 19th March 1943 she and her employees saw the defendants arrive together by train at the Union Station, Toronto, at about 9.45 p.m., go from there to a hotel, and go upstairs in the elevator. She and her employees then went to the hotel bed-room occupied by the defendants, and obtained entrance to it. The defendants "had just removed their coats." There was some discussion, during which the plaintiff told her husband she did not think the reports she had received "would reach to spending a week-end together", and he replied, "What do you expect when you won't let me come home?" The plaintiff and her employees left the room and the defendants stayed there. The employees kept the room under observation all night, and in the morning they and the plaintiff knocked on the bedroom door and insisted on entering. The defendants were in night clothes. Miss Reynolds was in bed, and wearing apparel was strewn about the room.

Jurisdiction to dissolve a marriage was conferred upon the Supreme Court of Ontario in 1930: The Divorce Act (Ontario), 1930, 20-21 Geo. V (Dom.), c. 14. The law of England as to the dissolution of marriage, and as to annulment of marriage, as it existed on the 15th day of July 1870, was thereby introduced into Ontario, so far as it could be made to apply. The provisions of this Act, in so far as they were within the competence of the Province, were validated and confirmed by the Ontario Legislature: The Marriage Act, 1933, (Ont.), c. 29. The governing legislation in England in 1870 was The Matrimonial Causes Act, 1857, c. 85, as amended in 1858, 1860, 1866 and 1868. See *Howe v. Howe et al.*, [1937] O.R. 57 at 61, [1937] 1 D.L.R. 508. The law as introduced into Ontario by this legislation is modified by a relevant Act of the Parliament of Canada, *viz.*, The Divorce Act, 1925, 15-16 Geo. V, c. 41, now The Marriage and Divorce Act, R.S.C. 1927, c. 127. Under this Act a wife may commence an action praying that her marriage may be dissolved on the ground that her husband has, since the

celebration thereof, been guilty of adultery. The conditions upon which a decree may be pronounced are then set forth (in s. 5) as follows:

“If the Court is satisfied by the evidence that the case of the wife has been proved, and does not find that the wife has been in any manner accessory to or has connived at the adultery of her husband, or that she has condoned the adultery complained of, or that the action was commenced and is prosecuted in collusion with the husband or the woman with whom he is alleged to have committed adultery, then the court shall pronounce a decree declaring such marriage to be dissolved: Provided always that the Court shall not be bound to pronounce such decree if it finds that the wife during the marriage has been guilty of adultery, or if the wife shall in the opinion of the court have been guilty of unreasonable delay in presenting or prosecuting such action or of cruelty towards the husband, or of having deserted or wilfully separated herself from the husband before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery.”

The evidence in this case establishes to my satisfaction that the defendant McPherson committed adultery with his co-defendant, as alleged by the plaintiff. But that finding alone is not sufficient to entitle her to a decree declaring the marriage to be dissolved. A finding by the Court that the wife has been in any manner accessory to or has connived at the adultery of her husband, or that she has condoned the adultery complained of, or that she is guilty of collusion, would be an absolute bar to the relief sought by her. Even if all such statutory conditions are satisfied and no such finding be made, the Court is not bound to pronounce a decree. It is possessed of a discretion which may be exercised in the following cases, *viz.*, “if it finds that the wife during the marriage has been guilty of adultery, or if the wife shall in the opinion of the court have been guilty of unreasonable delay in presenting or prosecuting such action or of cruelty towards the husband, or of having deserted or wilfully separated herself from the husband before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery.” This discretion is unfettered, and it is quite impossible to reconcile decisions depending on the exercise of it. There is a great

volume of contradictory views expressed in years gone by, which might readily cause confusion to a person seeking some rule or principle upon which to base a judgment. But it must be borne in mind that each decision represents the view of the author at the time and under the conditions of society then existing. Judges were naturally influenced by their personal convictions of what was in the best interest of the community at large, as well as what was just as between the parties particularly concerned in a case. The discretion, being unlimited, afforded an opportunity to each judge to voice his own belief on the subject of matrimony. Obviously, the range extended from the most narrow-minded to the most liberal conclusions. The outcome of a case depended on the breadth of view of the judge, but was also governed by the state of society. That state is ever changing, and judgment in matters of discretion must keep abreast of the times. Thus, no hard and fast rules can be laid down to serve as a standard for all future time and changing conditions. Some principles, however, do appear: "in every exercise of discretion the interest of the community at large in maintaining the sanctions of honest matrimony is a governing consideration: a strong affirmative case is necessary before a judge is justified under the statutes in negating their conditional prohibition; it is manifestly contrary to law that a judicial discretion in favour of a litigant guilty of misconduct in the matters in question should be exercised where that course will probably encourage immorality: if it is not unlikely to do so that is an argument against leniency": per Lord Merrivale in *Apted v. Apted and Bliss*, [1930] P. 246 at 259. It is perhaps unnecessary to emphasize that the discretion to be exercised must not be unreasonable or arbitrary, but must be judicial.

I proceed now to examine the evidence as to the conduct of the plaintiff. She and her husband cohabited from the time of their marriage in October 1938 until November 1942. She then demanded that he leave their home. She intended to bring the cohabitation to an end. She acted wilfully and deliberately, and her attitude towards her husband caused him to live separate from her. Did she have any reasonable excuse for her conduct? I think she did not. She states that marital intercourse was painful; it was not very pleasant for her having him come home at night; she did not want him to have intercourse with her, and made up her mind that if he did come

home he could not exercise that right. There is a complete absence of medical evidence to explain or justify her attitude.

There are, no doubt, cases in which a wife, reasonably and properly, is entitled to withdraw from sexual relationship with her husband. Each case must be decided on the evidence before the Court, and I cannot find in the record any reasonable excuse for the plaintiff's conduct. On the contrary, I think she was at fault, and wrongfully refused to perform her marital obligations.

In *Synge v. Synge*, [1900] P. 180 (affirmed [1901] P. 317), the President (Sir F. Jeune), at p. 194, said, "It cannot, I think, possibly be contended that consent to the ordinary rights of a husband does not fall within the marital duties of a wife"; and at p. 195: "The objects of married life, as expressed in the Marriage Service, are not the less true because they are the utterances of a more plain-spoken age than the present; and while human nature remains what it is, I think a husband has a right to decline to submit to a groundless demand of his wife that he should live with her as a husband only in name. Neither party to a marriage can, I think, insist on cohabitation unless she or he is willing to perform a marital duty inseparable from it." Lord Coleridge, in *Davis v. Davis*, [1918] P. 85, at p. 87, says that the language just quoted "ought to be written in letters of gold over the doors of all houses where husband and wife have to make allowances for each other." In *Synge v. Synge*, *supra*, it was held that a wife who, without cause, refuses to permit marital intercourse to her husband, cannot allege desertion without reasonable cause by him if, in consequence, he refuses to live with her, and that she is herself, in such circumstances, guilty of desertion without reasonable cause. See also *Hodgson v. Hodgson and Turner*, [1905] P. 233; *Evans v. Evans and Elford*, [1906] P. 125; *Davis v. Davis*, [1918] P. 85.

In *Herod v. Herod*, [1939] P. 11, the President (Sir Boyd Merriman), at p. 22, quotes from *Frowd v. Frowd*, [1904] P. 177 at 179, as follows: "Desertion means the cessation of cohabitation brought about by the fault or act of one of the parties"; also, at p. 21, he quotes from *Jackson v. Jackson*, [1924] P. 19 at 23: "If one of the spouses causes the other to live separate and apart, that is desertion."

On the evidence in this case, I find that the plaintiff, during the marriage, has been guilty of having deserted or wilfully separated herself from her husband before the adultery complained of, and without reasonable excuse. In such a case I am not bound to pronounce a decree declaring the marriage to be dissolved, and in the exercise of my discretion I refuse to do so.

There is another ground on which this action ought to be dismissed. I think that the plaintiff has been guilty of such wilful neglect or misconduct as has conduced to the adultery of her husband. She arbitrarily chose to separate from him. She omitted to fulfil her marital duties. She determined to end cohabitation. Subsequently, when she met her husband, she knew he was frequently in the company of the defendant Reynolds. He admitted that fact, but there is no evidence that she endeavoured in any way whatsoever to discourage that association, or that she was indisposed towards it. It does not appear that she was anxious, or even willing, that he should resume cohabitation. It may be observed too, that soon after this meeting she engaged men to watch her husband's conduct. She was, no doubt, suspicious, but did not disclose any inclination to prevent his wrongdoing. It must be considered whether such neglect or misconduct conduced to the adultery of the husband. In *Latour v. Latour and Weston*, (1861), 2 Sw. & Tr. 524, 164 E.R. 1100, Sir Cresswell Cresswell, at p. 529, says: "I cannot say, sitting in this seat, that a man is licensed to live in adultery with another woman, because his wife has deserted him." In *Synge v. Synge*, *supra*, at p. 207, the President says: ". . . I think it is a very long step—and one I cannot take—to say that a wife who refuses matrimonial intercourse has conduced to the adultery of her husband. A husband has no right to commit adultery because she refuses him. I think that would be a low and mean view to take of it. She may perhaps be morally responsible; but I do not say she has been guilty of conduct conducing to his adultery." But those views belong to a particular individual or individuals, as dictated by the facts of the case under consideration: also as appropriate to and governed by conditions of society at the time of expression.

Such views and findings may be well justified, and beyond all criticism or objection under such circumstances. But I am of

the opinion that they are inappropriate and cannot be adopted in this case and under present-day conditions. In Lush on Husband and Wife, 4th ed., 1933, p. 32, the learned author says: " . . . one would argue that in these more enlightened days the Court would hold the wife's refusal of sexual intercourse as conduct conducive to his adultery". I think such a contention is sound and should be given effect in the present case.

In this connection it may be noted that when the plaintiff found her husband in the hotel bed-room with Miss Reynolds, he said to her, "What do you expect when you won't let me come home?" The very thing happened which she ought to have anticipated, and I find that her neglect and misconduct conduced to his adultery.

It is perhaps not necessary to determine whether the plaintiff is guilty of connivance. I do not consider that question at length, but some facts may be briefly mentioned.

When the plaintiff and her watchmen were in the bed-room with the defendants on the evening of 19th March, she knew, or must have known, that an act of adultery would likely be committed by her husband. But it does not appear that she took any step to prevent such a happening. She could have made known to the hotel authorities that the room was occupied by her husband and a woman who was not his wife. She had available at that time the services and advice of a solicitor, but she was apparently content to stand by and let matters take their course. It may be argued that there was acquiescence on her part "by wilfully abstaining from taking any steps to prevent that adulterous intercourse which, from what passes before his eyes, he cannot but believe or reasonably suspect is likely to occur": per Lord Westbury in *Gipps v. Gipps and Hume* (1864), 11 H.L. Cas. 1 at 14, 11 E.R. 1230, affirming 3 Sw. & Tr. 116, 164 E.R. 1217; see also *Lloyd v. Lloyd and Leggeri*, [1938] P. 174.

For the reasons I have given, and in the exercise of the discretion vested in the Court, I shall not pronounce a decree that the marriage in question be dissolved. The action must, therefore, be dismissed, without costs.

Action dismissed without costs.

Solicitor for the plaintiff: Ed. Hartley Dewart, Toronto.

[LAIDLAW J.A.]

Pearl v. Pearl and Lees.

Divorce—Bars to Relief—Passive Connivance—Husband Not Attempting to Prevent Adultery.

Where a husband, having good reason to believe that his wife is about to commit adultery, makes no effort to prevent such an act on her part, but, on the contrary, stands by and watches an act of adulterous intercourse, he is guilty of "passive connivance", and will be disentitled to a divorce based upon the act of adultery which he permitted to happen. *Gipps v. Gipps and Hume* (1864), 11 H.L. Cas. 1 at 14; *Lloyd v. Lloyd and Leggeri*, [1938] P. 174, applied.

AN undefended action, by a husband, for dissolution of marriage.

27th September and 1st October 1943. The action was tried by LAIDLAW J.A. without a jury at Toronto.

Fred R. Marshall, for the plaintiff.

No one for the defendants.

19th October 1943. LAIDLAW J.A.:—The plaintiff seeks the dissolution of the marriage solemnized between him and the defendant Ruby Margaret Pearl on the 23rd day of August 1939, on the ground of her adultery with the defendant Ronald Lees.

In January 1942 Mrs. Pearl left her husband and did not subsequently cohabit with him. He engaged the services of a man to keep the conduct of his wife under observation. Later he sought the company of Miss Betty Milne Hodgins, and as she describes it at trial he "took her out two or three times a week during the past year or year and a half." Late at night on 23rd December 1942 he listened at the door of an hotel bedroom in Toronto and heard the voices of his wife and a man from inside the room. He found out that his wife and her companion intended to leave the room for a period of time. During their absence he gained entrance and hid in a clothes cupboard. The door was left partly open. His wife and the defendant Lees came into the room, "had several drinks", removed their clothes, and got into bed together. The room was partly lighted, and the plaintiff says that he saw, from his place in the cupboard, an act of adultery committed by the defendants. He came out of his hiding place and threw the clothes of the defendants out of the window. A house officer of the hotel was called to the room and observed that Mrs. Pearl "had part of the bed clothes around her" and Lees had on a pair of trousers.

Miss Hodgins also came to the room in response to a telephone request from the plaintiff. She testified to the same state of the defendants.

If Mrs. Pearl did not commit adultery as charged by her husband, the action must, of course, fail. But, even if an act of adulterous intercourse occurred, as stated by the plaintiff, it does not necessarily follow that he is entitled to a decree to dissolve the marriage. Before that relief can properly be granted the Court must be satisfied that the plaintiff is not himself so implicated or involved in the wrong-doing of his wife as to justify the Court in refusing his prayer. It has been said that he cannot "avail himself of a case in which he does not appear with clean hands": per Sir William Scott, afterwards Lord Stowell, in *Timmings v. Timmings* (1792), 3 Hag. Ecc. 76 at p. 77, 162 E.R. 1086. See also *Everett v. Everett and McCullum*, [1919] P. 298; *Sloggett v. Sloggett*, [1928] P. 148.

" . . . the Court is required not only to deal with issues raised by the parties, but with independent matters deemed by the legislature fit to be dealt with, in respect of a larger interest, that namely of the community": per Lord Merrivale in *Sloggett v. Sloggett*, *supra*, at p. 153. *Inter alia*, the Court must be satisfied that the plaintiff is not guilty of connivance. The burden rests on the plaintiff to show that he is innocent. What conduct amounts in law to connivance? In *Moorsom v. Moorsom* (1792), 3 Hag. Ecc. 87, at 107, 162 E.R. 1090, Sir William Scott (Lord Stowell), said: "I have no difficulty in saying that mere passive connivance is as much a bar as active conspiracy". Sir John Nicholl, in *Rogers v. Rogers* (1830), 3 Hag. Ecc. 57 at p. 59, 162 E.R. 1079, said: "Passive acquiescence would be sufficient to bar the husband, provided it appeared to be done with the intention and in the expectation that she would be guilty of the crime: but on the other hand it has always been held that there must be a consent. The injury must be volenti, it must be something more than mere negligence; than mere inattention; than over-confidence: than dullness of apprehension; than mere indifference: it must be intentional concurrence in order to amount to a bar." In *Gipps v. Gipps and Hume* (1864), 11 H.L. Cas. 1, 11 E.R. 1230, affirming 3 Sw. & Tr. 116, 164 E.R. 1217, Lord Westbury L.C. said, at p. 14 (H.L. Cas.): "The word 'conniving' . . . must include the case of a husband acquiescing in, by wilfully abstaining from taking steps to prevent, that adulter-

out intercourse which, from what passes before his eyes, he cannot but believe or reasonably suspect is likely to occur." In Raydon on Divorce, 4th ed., p. 128, the learned author comments: "in approving this decision the House of Lords seem to have extended 'connivance' to wilfully abstaining (even without corrupt intention) from preventing adulterous intercourse, which might reasonably be expected to occur". A review of authorities appears in the case of *Lloyd v. Lloyd and Leggeri*, [1938] P. 174, where Langton J. discusses the qualification contained in the statement in *Rogers v. Rogers, supra*, that to bar the husband by passive acquiescence on his part it must appear "to be done with the intention and in the expectation that she would be guilty of the crime". He says, at p. 182, "Obviously the learned judge is contemplating an act of adultery to come, and means only passive acquiescence in an adultery which he sees is likely to happen". And at p. 184, he interprets the term "intentional concurrence" as meaning "knowledgeable concurrence . . . concurrence with intention in the sense of knowledge of all the circumstances." Again at p. 183, he says: "I find it very difficult to read the expression 'mere passive connivance' [as used by Lord Stowell in *Moorsom v. Moorsom, supra*] as meaning anything than standing by without taking any active step to interfere." Finally, from p. 185 I quote as follows " . . . if a man stands by and takes no step to prevent the commission of adultery by his wife, the mere fact that he may dislike her action or may even request her to desist does not relieve him from the stigma of passive connivance." The underlying principle to be applied is found in the maxim *volenti non fit injuria*. When a party knows of a danger which he sees is likely to arise and, having an opportunity to prevent it, takes no steps to do so, but submits to the happening, he is *volens*. If he permits the obvious danger to continue, and omits to use the knowledge and means available to him of avoiding the danger, he cannot subsequently complain of injury resulting to him. In a sense he encouraged and invited the happening of the harmful thing. Even if he hoped and wished that it would not occur, if he be willing by his conduct or words that it should do so, he must be taken to consent to it. The injury thus becomes *volenti*.

The evidence in this case shows that the plaintiff was so inseparably associated with and implicated in the wrong-doing of his wife that he cannot now be granted a decree of divorce. He

suspected that an act of adultery was likely to be committed by her while he was hidden in the cupboard. He foresaw the danger and realized the injury he would suffer from her wrong-doing. He stood by and watched her act of adulterous intercourse, but refrained from taking any steps whatever to prevent it. He had full opportunity to do so, but he chose by his conduct to tolerate and acquiesce in the very act of adultery of which he now complains to this Court. There was passive consent on his part amounting to "passive connivance". He is guilty of "knowledgeable concurrence, concurrence with intention in the sense of knowledge of all the circumstances": per Langton J. in *Lloyd v. Lloyd and Leggeri*, *supra*, at p. 184. The Court is not satisfied on the evidence that there was no connivance by the plaintiff. This finding is not merely incidental, but creates an absolute bar to relief. I express the view, too, that it is the duty of the Court to make close inquiry in matrimonial causes to find whether the plaintiff is guilty of any of the acts which are or might be a defence. The private relationship of the parties is not the sole consideration in this class of cases. The interest and welfare of the community, the maintenance of good morals, the proper preservation of the marriage state and guarding against easily acquired dissolution of marriage are of special concern.

The facts of this case are such that it would be shocking, in my opinion, to grant the plaintiff redress for a wrong with which he is so implicated and stigmatized as to be soiled in hands and mind. The action should therefore be dismissed without costs.

Action dismissed without costs.

Solicitor for the plaintiff: Fred R. Marshall, Toronto.

[PLAXTON J.]

Heriteau et al. v. W. D. Morris Realty Ltd., Trading as Capital Storage Company.

Liens—Warehouseman's Lien—When Lien Lost—Warehouseman Induced by Fraud to Part with Goods—Goods subsequently Returned to his possession—Revival of Lien—Extent of Lien—Costs—The Warehousemen's Lien Act, R.S.O. 1937, c. 186.

Where a warehouseman is induced by fraud to part with possession of goods stored with him, his lien will revive if the goods are subsequently returned to his possession. *Crabtree v. Griffith* (1863), 22 U.C.Q.B. 573 at 577, applied. Thus where the agent of the owner of goods induced a warehouseman to forward the goods to an auction room, representing that he would obtain the owner's instructions to sell the goods to pay arrears of storage charges, and no such consent was given by the owner, *held*, the goods having been returned to the warehouseman's possession, his lien revived.

It is a settled principle that if a bailee, having a lien on a chattel, chooses to keep the chattel for the purpose of enforcing his lien, he cannot add to his lien a further charge for keeping the chattel until the debt is paid. *Somes et al. v. The Directors of the British Empire Shipping Company* (1860), 8 H.L. Cas. 338, 11 E.R. 459, applied. It may, however, be proper for the Court to direct that the costs of an action in which the lien is established should be added to the lien. *Hall v. Campbell's Security Fireproof Storage and Moving Co. Limited* (1922), 23 O.W.N. 224, referred to.

Bailment—Liability of Bailee for Hire—Negligence—Sufficiency of Evidence.

A bailee for hire is bound to use ordinary diligence in the care and preservation of goods entrusted to him, but he is not an insurer. If the goods are lost or damaged while in his custody, the onus is upon him to prove that there has been no want of ordinary care on his part. But if the evidence, instead of establishing such a want of care, leads rather to a conclusion that the loss or damage resulted from causes for which the bailee is in no way responsible, such as defective packing before the goods reached him, any claim against him must fail.

Companies—Carrying on Business under Name other than Corporate Name—Whether Company thereby Disentitled to Sue—The Companies Act, 1934 (Dom.), c. 33, ss. 7(1)(a), 24, 135—The Partnership Registration Act, R.S.O. 1937, c. 189, s. 9(2), as re-enacted by 1941, c. 41, s. 3.

There is nothing, either at common law or in the provisions of the Dominion Companies Act, 1934, c. 33, to prohibit an incorporated company from carrying on business under a name other than its corporate name, and it will therefore not be precluded from suing to recover moneys earned by it under such a name. *Bonanza Creek Gold Mining Company, Limited v. The King*, [1916] 1 A.C. 566, applied. The provisions of The Partnership Registration Act, R.S.O. 1937, c. 189, as amended, do not apply to an incorporated company.

AN action for the return to the plaintiffs of goods stored by them with the defendant company, and for damages. The defendant counterclaimed for storage charges. The action was originally brought by Marcel Heriteau alone, but his wife, P. S. Heriteau, was added as a party plaintiff by order of the trial judge. The defendant company carried on a storage business

under the name of "Capital Storage Company", and it was under that name that it had all its dealings with the plaintiffs.

Two lots of household effects were deposited with the defendant for storage by the plaintiffs in 1934 and 1935. One lot, consisting of the furnishings of a house occupied until then by the plaintiffs in France, was stored exactly as it arrived from France, without unpacking. The packing material used for these goods was largely hay, and evidence was given at the trial to the effect that hay was an unsatisfactory material for such purposes because of its tendency to disintegrate.

From 1937, the storage charges fell into arrears, and these charges amounted, in January 1939, to \$312. At that time the defendant threatened to sell the goods unless the storage charges were paid. Correspondence and negotiations, in which the plaintiffs were represented by one Murdock, continued until June 1941, at which time the defendant wrote giving "final notice" that it would proceed to sell the goods at public auction on or after 7th July following.

In August 1941 the goods were removed by the defendant's employees to the auction rooms of one Snipper, and were there opened. Murdock, who saw them there, noticed at that time that some of them were damaged. The evidence as to the circumstances in which this removal took place was conflicting, and the trial judge's finding on this point sufficiently appears in the reasons for judgment. Snipper sold nothing but two cases of books, which were bought by one Clark, but which were returned by Clark, at Snipper's request, three or four days later. Clark had also found, in the boxes, a portfolio containing photographs and letters, which was returned to Mrs. Heriteau after the other goods had been returned to the defendant's warehouse.

On 10th September the company advised Mrs. Heriteau that the goods had been at Snipper's auction rooms for more than a month, and that unless the account was paid the sale would be proceeded with on 15th September. On the same day Murdock wrote to the company saying that Mrs. Heriteau objected to the removal and opening of the boxes without notice to her. On 15th September the plaintiffs' solicitor wrote to the company stating that its warehouseman's lien had been lost by the removal of the goods, and that Mrs. Heriteau would hold the company and the auctioneer responsible, and demanding the immediate return of the goods and the making good of any loss sustained.

The goods were all returned to the defendant's warehouse on 19th September. On 25th September the defendant gave notice, pursuant to The Warehousemen's Lien Act, R.S.O. 1937, c. 186, of its intention to sell the goods at public auction failing payment of storage charges. The writ in this action was issued on 21st October, and the defendant thereupon discontinued its proceedings.

12th, 15th and 16th March 1943. The action was tried by PLAXTON J. without a jury at Ottawa.

B. Goldfield, K.C., for the plaintiffs.

A. Macdonald, for the defendant.

25th October 1943. PLAXTON J.:—In this case, on the pleadings and the evidence adduced at the trial, the issues presented for decision are these:

1. Whether or not the plaintiffs are entitled to an order against the defendant directing the return of the goods and chattels delivered to it for storage.

2. Whether or not the plaintiffs are entitled to recover damages from the defendant for injury and loss alleged to have been sustained by them through alleged negligence on the part of the defendant in the performance of its duties as a warehouseman.

3. Whether or not the defendant is entitled to recover from the plaintiffs the storage charges which accrued due in respect of the said goods and chattels.

It will be convenient first to review the evidence, documentary and oral, which was adduced at the trial, and then to consider, in the light of the evidence and of the applicable principles of law, each of the issues above stated.

[The judgment here sets out a summary of the evidence given, and proceeds:]

1. As to the return of the goods: The plaintiffs' claim for an order directing the return of the goods in question to them appears to be based upon the pretension that the defendant, by parting with the possession of the goods to Snipper, and by the latter's sale of two boxes of books to Mr. Clark, lost its warehouseman's lien for storage charges.

There is an obvious conflict between the evidence of Murdock on the one hand and that of Acheson [the president of the defendant company] and Snipper on the other hand. Murdock

testified that he had never authorized Acheson or Snipper to have the goods and chattels in storage transferred to Snipper's auction rooms for sale, and that he had no authority to do so. Mrs. Heriteau testified that her husband had given Murdock a power of attorney, but it was not produced in evidence. Certainly he alone, acting as the agent of the Heriteaus, undertook the conduct of negotiations, whether orally or by correspondence, with the Capital Storage Company and Snipper.

As between the evidence of Murdock on the one hand, and that of Acheson and Snipper on the other hand, I am disposed to accept the evidence of the latter. They are experienced and reputable business men. Acheson, who has been associated with the Capital Storage Company since 1908, though no doubt interested in recovering the arrears of storage charges, certainly had nothing to gain by adopting any course of action which would be calculated to prejudice, or even to involve the loss of, the company's warehouseman's lien for storage charges. I accept his evidence that he was instructed by Murdock to remove the goods and chattels to Snipper's auction rooms, and that in causing the goods and chattels to be so removed, he acted in good faith on Murdock's assurance that he would obtain a letter from Mrs. Heriteau authorizing the sale of the goods. Furthermore, Snipper had no interest, except as an auctioneer who might anticipate a commission on the sale of the goods and chattels, in bringing about the unauthorized removal of the goods and chattels to his auction rooms. I accept his evidence that he understood the goods were sent to him, at Murdock's instance, to sell, because on 1st August Murdock had told him the goods would have to go to his place for sale, and he, Snipper, asked him to call the Capital Storage Company about the matter. Moreover, I accept his evidence that Murdock told him he was anxious to get the goods and chattels out of the Capital Storage Company's warehouse, so as to avoid paying storage charges; that is to say, to get rid of the warehouseman's lien. On Murdock's own statement in correspondence (see Ex. 2, his letter to the Capital Storage Company of 20th January 1940), Mrs. Heriteau had no resources; and if the goods and chattels could not be held and made answerable for the storage charges, the Capital Storage Company would be unable to recover their charges.

I believe Murdock contrived, by stratagem, to induce Acheson of the Capital Storage Company, and Snipper, to bring about the transfer of the goods and chattels to Snipper's auction rooms for sale, with a view to getting rid of the company's warehouseman's lien. His conduct in that regard amounted to an attempt to defraud the Capital Storage Company of its warehouseman's lien; and, in these circumstances, the company having regained possession of the goods and chattels, their lien revived.

In *Crabtree v. Griffith* (1863), 22 U.C.Q.B. 573 at 577, Draper C.J. said:

"The general rule is that there can be no lien upon any property unless it is in the possession of the party who claims the lien, and, unless by express contract, this rule applies where the possession has been parted with, and has afterwards been recovered, (*Sweet et al. v. Pym* (1800), 1 East 4, 102 E.R. 2) unless indeed the property has been taken away by a trespasser or by fraud, (*Wallace v. Woodgate* (1824), Ry. & Mood. 193 at 194, 171 E.R. 990)." See also Halsbury's Laws of England, 2nd ed., vol. 20, p. 585.

In the result, I am of opinion that the plaintiffs are not entitled to an order directing the return of the goods and chattels to them.

2. As to the claim for damages: The defendant was a bailee for hire of the goods and chattels in question.

The legal obligation of such a bailee towards the bailor are well settled. He is bound to use ordinary diligence in the care and preservation of the property entrusted to him: *Best v. Yeates* (1676), 1 Vent. 268, 86 E.R. 180; *Brabant & Co. v. King*, [1895] A.C. 632 at 640; *Cheshire v. Bailey*, [1905] 1 K.B. 237 at 241. The liability continues until the relationship of bailor and bailee ends: *Mitchell v. Davis* (1920), 37 T.L.R. 68. The bailee, however, is not an insurer: *Cheshire v. Bailey*, *supra*; *Consolidated Tea and Lands Company et al. v. Oliver's Wharf*, [1910] 2 K.B. 395; therefore, he is not liable for loss by mere accident not resulting from his negligence: *Garside v. The Proprietors of the Trent and Mersey Navigation* (1792), 4 T.R. 581, 100 E.R. 1187; *Turner v. Civil Service Supply Association, Limited*, [1926] 1 K.B. 50; *Fagan v. Green and Edwards, Limited*, [1926] 1 K.B. 102.

Where goods are lost or damaged while in the bailee's custody, the onus is on him to prove that it occurred through no want of ordinary care on his part: *Mackenzie v. Cox* (1840), 9 C. & P. 632, 173 E.R. 987; *Reeve v. Palmer* (1858), 5 C.B.N.S. 84, 141 E.R. 33; *Phipps v. New Claridge's Hotel (Limited)* (1905), 22 T.L.R. 49; *Van Geel v. Warrington*, 63 O.L.R. 143 at 147, [1929] 1 D.L.R. 94; *Herbert v. C. A. Ward Ltd.*, [1937] O.W.N. 139 at 141.

The bailee must not deal with the goods bailed in a way not authorized by the bailor. If he does so deal with them he takes upon himself the risk of so doing, except when the risk is independent of his act or inherent in the goods themselves: *Lilley v. Doubleday* (1881), 7 Q.B.D. 510.

On the evidence, I am unable to find that any damages the plaintiffs may have suffered, by reason of breakages of china and glassware packed in the boxes stored at the defendant's warehouse, were due to any want of ordinary care on the part of the company in the performance of its duty as a warehouseman. It seems to me to be very probable that the breakages which were revealed when the boxes were unpacked at Snipper's auction rooms were due, not to carelessness in the handling of the boxes, but rather to the deterioration during the preceding six years of the packing medium, *viz.*, the hay, in which they were packed, and possibly also to handling in transit from France to Canada. Servants of the defendant company testified that the boxes and other goods and chattels belonging to the plaintiff had been given ordinary care, and Snipper testified that when the goods and chattels were removed to his auction rooms, they were handled carefully. No countervailing evidence was led.

The plaintiffs complain that a manuscript entitled "The Marriage of Hamlet" is missing from the portfolio in which Mrs. Heriteau testified it had been placed when the boxes were packed. This portfolio was quite obviously in one of the boxes in which the books were packed, as that is where Mr. Clark found it. The plaintiffs are claiming damages for the loss of this manuscript as if it had been satisfactorily proved that the manuscript has in fact been lost; but no such proof has been adduced. Admittedly, Mrs. Heriteau made no inquiries about the manuscript; and neither she nor Murdock has made any search of the boxes of books which were returned by Mr. Clark to Snipper's auction

rooms and from there to the Capital Storage Company's warehouse. It may well be that a search of these boxes would bring the manuscript to light; but, at any rate, in the absence of satisfactory proof that such a search has been made and the manuscript not discovered, I am unwilling to assume that the manuscript is in fact lost. In the result, I am of opinion that the plaintiff's claim for damages suffered through the alleged negligence of the defendant company, or its servants, should be dismissed with costs.

3. As to the defendant's counterclaim for storage charges: It is pleaded by the plaintiffs, and was contended in argument, that the defendant cannot maintain its counterclaim for the reason that it has not complied with the provisions of The Partnership Registration Act, R.S.O. 1937, c. 189, referring to s. 9(2) of that Act, as amended by 1941, c. 41, s. 3.

In the style of cause the defendant is described as "W. D. Morris Realty Limited, trading as Capital Storage Company". The company's storage business is carried on under the name "Capital Storage Company". It appears from the defendant's statement of defence (delivered 28th November 1941) that, while the defendant was not registered under the provisions of The Partnership Registration Act when the writ of summons in this action was issued, a declaration complying with the provisions of that Act was registered in the registry office for the registry division of the city of Ottawa on the 26th day of November 1941, as No. 6334. The plaintiffs, nevertheless, moved to strike out the defendant's counterclaim. This motion was dismissed by the late Local Master of the Supreme Court at Ottawa, and an appeal from his order was dismissed by Hope J., but without prejudice to the question being raised at the trial. The latter's reasons for judgment are reported in *Heriteau v. W. D. Morris Realty Limited et al.*, [1941] O.W.N. 459, [1942] 2 D.L.R. 257. The learned judge gives persuasive reasons in support of the view that the defendant, being an incorporated company, is not obliged to comply with the provisions of The Partnership Registration Act. With his reasons and his conclusion, I respectfully agree.

Counsel for the plaintiffs further contended that the provisions of The Companies Act, 1934 (Dom.), c. 33, under which the defendant company W. D. Morris Realty Ltd. was incorporated by letters patent in 1922, prohibit the company from

carrying on business except in its own corporate name, and that it is not entitled to collect any charges for services rendered in a business carried on by it otherwise than in its own corporate name, namely, the business of a warehouseman which it carries on in the name of Capital Storage Company, which is in law a non-existent company, in fact merely an assumed name. Counsel for the plaintiffs cited the following provisions of the Dominion Companies Act:

S. 7(1)(a), which requires that the application for letters patent of incorporation shall set out, amongst other particulars, "The proposed corporate name of the company, the last word of which shall be the word 'Limited' or the abbreviation thereof, 'Ltd.' "

S. 135, which provides: "In any action or other legal proceeding, it shall not be requisite to set forth the mode of incorporation of the company, otherwise than by mention of it under its corporate name as incorporated by virtue of letters patent, or of letters patent and supplementary letters patent, as the case may be"; and

S. 24, which imposes penalties upon every director, manager or officer of a company, and every person on its behalf, who, *inter alia*, "issues or authorizes to be issued any bill of parcels, invoice or receipt of the company; wherein its name is not mentioned in legible characters".

In *Bonanza Creek Gold Mining Company, Limited v. The King*, [1916] 1 A.C. 566 at 582-3-4, 26 D.L.R. 273, 10 W.W.R. 391, 34 W.L.R. 177, 25 Que. K.B. 170, the Judicial Committee (judgment by Viscount Haldane) decided that companies incorporated under Part I of the Dominion Companies Act derived their existence from the act of the sovereign by grant of a charter from the Crown which confers on the company "a status resembling that of a corporation at common law, subject to the restrictions which are imposed on its proceedings." And, again, "In the case of a company created by charter, the doctrine of ultra vires has no real application in the absence of statutory restriction added to what is written in the charter. Such a company has the capacity of a natural person to acquire powers and rights. If by the terms of the charter it is prohibited from doing so, a violation of this prohibition is an act not beyond its capacity, and is therefore not ultra vires, although

such a violation may well give ground for proceedings by way of scire facias for the forfeiture of the charter."

At common law, a corporation, it is stated in Brice's Doctrine of Ultra Vires, third ed., p. 2, "may possess several names (*Vaughan v. E. of Bedford*, Cro. Eliz. 351; see 3 Lev. 243; *Conro v. Port Henry Iron Co.*, 12 Barb. 27) which may be expressly given to it or acquired by reputation or prescription (see *Knight v. Mayor, &c. of Wells*, 1 Ld. Raym. 80; *Ayray's Case*, 11 Rep. 20, 22; *Dutch W. Ind. Co. v. Van Moses*, Stra. 611; *Smith v. Plank Road Co.*, 30 Ala. N.S. 650)."

In 8 Halsbury, 2nd ed., p. 10, it is stated: "A corporation may have different names for different purposes", citing *College of Physicians v. Butler* (1632), W. and Jo. 261. So also Grant on Corporations, at pp. 50-51, states:

"Though a corporation must have a name, the restriction does not extend to bind it to one name; for it is said a corporation may have several names (*Vaughan v. E. of Bedford*, Cro. Eliz. 351; 6 Vin. Abr. 272, pl. 16; Bac. Abr. Corporations, C. 3; *Reg. v. Bailiffs of Ipswich*, Salk. 435)."

In 14 Corpus Juris, p. 308, it is stated:

" . . . that a corporation, even when a corporate name is stated in its charter or certificate of incorporation, may, in the absence of statutory provision to the contrary, assume another name by which to contract or do business and thus have two or more names, one by its charter or certificate of incorporation and another by usage and reputation, so that contracts or deeds made in the assumed name will be binding". See *William Gilligan Company v. Casey* (1910), 205 Mass. 26 at 31; *Phillips v. International Text Book Company* (1904), 26 Pa. Sup. Ct. 230 at 232; *Goodyear Rubber Co. v. Goodyear's Rubber Mfg. Co. et al.* (1884), 21 Fed. 276, 277. See also Fletcher's Encyclopedia on Incorporations, vol. 2, pp. 1687-88. It does not, I apprehend, admit of question that at common law a natural person may assume a name for the purpose of carrying on business; so, also, then, (applying the *rationale* of the judgment of the Judicial Committee in the *Bonanza Creek* case) may a company incorporated by letters patent under Part I of the Dominion Companies Act, subject, of course, to such restrictions as that Act provides.

Is it, then, *ultra vires* of a company incorporated by letters patent under the Dominion Companies Act to carry on a business, to wit, the business of a warehouseman, under an assumed

name, namely, the name Capital Storage Company? The provisions of the Dominion Companies Act do not appear to embody any prohibition or restriction against a company incorporated by letters patent thereunder carrying on a business under an assumed name, neither do the letters patent of W. D. Morris Realty Ltd. contain any such prohibition or restriction. Therefore, it follows that it was not *ultra vires* of W. D. Morris Realty Ltd. to carry on the business of a warehouseman under an assumed name, to wit, the name Capital Storage Company.

If that conclusion be well founded, then *cadit quaestio*. The objection raised by the plaintiffs to the defendant's right to recover on its counterclaim is not well grounded, and the defendant is entitled to succeed.

There is also another ground upon which I think the defendant is entitled to succeed on its counterclaim. If it be not *ultra vires* of the defendant company, W. D. Morris Realty Ltd., to carry on the business of a warehouseman under the assumed name Capital Storage Company, the plaintiffs are, in my view, estopped from denying their liability to pay the storage charges which have become due to the Capital Storage Company. They deposited goods and chattels for storage in the warehouse of Capital Storage Company. They accepted receipts for such goods and chattels in the name of Capital Storage Company (Exhibits 9 and 10). They, or at any rate, the plaintiff Mrs. P. S. Heriteau, undertook to pay storage charges at the rates set out in the said receipts. They made various payments on account of storage charges to the Capital Storage Company. Capital Storage Company have performed the duties of a warehouseman in respect of the storage of such goods and chattels in reliance upon the plaintiffs' express undertaking to pay their storage charges at the rates specified in the said receipts.

The plaintiffs, as bailors, are therefore estopped from disputing Capital Storage Company's right as their bailee to the possession of the goods and chattels for the purpose of the particular bailment and the incidental right to be paid the storage charges which have become due.

In the result, I am of opinion that the defendant is entitled to recover its storage charges, but that the amount should be limited to the amount which had accrued due at the time the defendant filed its counterclaim, *viz.*, \$388.00.

The defendant claims further storage charges while the goods remain in its possession, but it is a settled principle that if a bailee, having a lien on a chattel, chooses to keep the chattel for the purpose of enforcing the lien, he cannot add to his lien a further charge for keeping the chattel till the debt is paid: *Somes et al. v. The Directors of the British Empire Shipping Company* (1860), 8 H.L. Cas. 317, 11 E.R. 459.

Accordingly there will be judgment for the defendant for the sum of \$388.00 and costs, and I think it proper to direct (as was done in *Hall v. Campbell's Security Fireproof Storage and Moving Co. Limited* (1922), 23 O.W.N. 224) that all costs be added to the lien of the defendant company for storage charges.

Plaintiffs' action dismissed with costs; judgment for defendant on counterclaim, with costs.

Solicitor for the plaintiffs: B. Goldfield, Ottawa.

Solicitors for the defendant: Clark, Robertson, Macdonald & Connolly, Ottawa.

[PLAXTON J.]

Crysler et al. v. Pearse.

Medicine and Surgery—Malpractice—Degree of Care to be Expected—Fair and Reasonable Standard of Care and Competence—Patient Burned during Operation.

The degree of care required of a surgeon who undertakes to operate upon a patient is that laid down in *Rex v. Bateman* (1925), 41 T.L.R. 557, 19 Cr. App. R. 8. The law requires a fair and reasonable standard of care and competence, and a jury should neither be satisfied with a very low standard, nor exact the highest, or a very high, standard. A surgeon does not become an actual insurer, and will not be liable merely because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way. *Marshall v. Rogers*, [1943] 2 W.W.R. 545, [1943] 4 D.L.R. 68, referred to.

Where a surgeon operated with an electric cauterizing instrument, after having sterilized the patient's body with alcohol, and flames broke out which were held to have resulted from the igniting of excess alcohol which had either remained on the patient's body or run down off the body on to the operating table, *held*, in view of the surgeon's admissions, and of the expert evidence, it must be held affirmatively that he had failed to take reasonable precautions, and, the patient having been severely burned, the surgeon was liable in damages.

Since the allegations of negligence in the pleadings were sufficient to support the cause of action, and since these allegations had been substantiated by the evidence, it was unnecessary for the Court to decide whether an action for trespass to the person would lie in the circumstances, or whether the burden of disproving negligence was upon the defendant, either under the rule *res ipsa loquitur* or under the principle laid down in *Pleet v. Canadian Northern Quebec R.W. Co.* (1921), 50 O.L.R. 223.

AN action against a surgeon for damages. The facts are fully stated in the judgment.

9th September 1943. The action was tried by PLAXTON J. without a jury at St. Catharines.

J. R. Cartwright, K.C., and *J. G. Schiller, K.C.*, for the plaintiffs.

D. L. McCarthy, K.C., and *W. R. West*, for the defendant.

2nd November 1943. PLAXTON J.:—In this action, the plaintiffs, a married couple residing in the city of St. Catharines, seek to recover from the defendant, a medical practitioner practising his profession in the city of Toronto, damages in respect of severe injuries alleged to have been suffered by the plaintiff Violet M. Cryslar, in the form of large burns on her buttocks and perineum, in the course of an operation performed upon her by the defendant.

The defendant, a graduate of the Royal College of Surgeons, London, England, has practised his profession continuously (except for a period of four years during the Great War) since

1909. He is Associate Professor of Surgery at the University of Toronto, and senior surgeon in urology at Toronto General Hospital.

In January 1943, the plaintiff Violet M. Crysler, a woman 59 years of age, was suffering from a urethral caruncle, and an operation was found to be necessary. She was sent by her local physician to the defendant, with whom she and her husband contracted to have the necessary operation performed. The operation was performed by him in the Toronto General Hospital on 4th January 1943. He was assisted by Dr. H. J. Sullivan, by an anaesthetist, and by the head nurse in the operating room, Miss Molly G. Rowe. By his statement of defence the defendant admits that he performed the operation in question upon the said plaintiff, and also that during the course of the operation the said plaintiff suffered burns of the buttocks and perineum, but he specifically denies that such burns were caused by any negligence on his part, and alleges that in the performance of the said operation he exercised fair, reasonable, and competent professional skill and due care.

Diathermy was the method employed by the defendant to remove the caruncle. In the course of the operation, alcohol, which had been used by the defendant to sterilize surfaces of the patient's body surrounding the site of the operation, became ignited and caused the burns of which the plaintiff complains.

[The judgment here sets out the evidence as to the nature and extent of the plaintiff's injuries, and proceeds:]

The manner in which the operation was carried out was described in detail in the defendant's evidence. The operating table used was a metal operating table, on which was placed a mattress covered with a waterproof sheet, and over that a sheet and a towel. The patient was placed upon this covering, lying flat upon her back with her legs held up and stretched apart by stirrups, so that her buttocks were in a vertical position facing the surgeon. She was given a general anaesthetic. The urethral caruncle to be removed was a red, tender nodule of flesh which obtruded from the orifice of the urethral channel just within the labia.

Diathermy is a method of removing such a tumour by the application of a high frequency current. The apparatus consists of a battery, from which an insulated conducting wire is attached by a clip to a pliable metal plate about one foot square

(Ex. 3), known as the indifferent electrode. This is placed under the buttocks of the patient. The cutting wire (Ex. 4) is plugged into the battery, and at its other end is inserted a fine wire or needle which is the active electrode. The current, an alternating current of high frequency, high voltage and low amperage, is delivered to the electrode by depressing a foot treadle or switch which rests on the floor at the foot of the operating table. The placing of the needle or active electrode against the patient's tissue at the site of the operation completes the current. Heat, of sufficient intensity to cut the tumour, is produced by the resistance of the tissue.

As sterilization of the site of the operation and of the surrounding surfaces of the patient's body is necessary, there was placed upon a small table back of where the surgeon stood a small bowl (Ex. 6) containing a solution of 81 per cent. alcohol. The bowl will hold two or three fluid ounces. Miss Rowe testified that the bowl was half full on the occasion of the operation in question. Also made ready for the surgeon were two or three sponge forceps in which were held gauze swabs (Ex. 5). The alcohol is applied by dipping the gauze swab into the alcohol, gently shaking off any excess alcohol and then wiping off the surfaces required to be sterilized. When this is done, sterilized drapes are pulled over the patient's legs, buttocks and body, up to the neck; they hang down over the table to the floor. The field of operation is exposed by a slit in the drapes about eight inches long. The patient is then ready for the operation. The surgeon then everts the tumour with a wooden applicator and applies a pair of fine forceps to the base of the tumour. The surgeon then transfers the forceps to his left hand, and, holding the active electrode in his right hand, he applies the point of the needle to the tissue to be cut, and switches on the current. Three strokes of the needle, with the current switched on at the beginning and switched off at the end of each stroke, sever the tumour, which he then removes with forceps to the small table behind him. The operation occupies one minute after the current is applied.

The defendant testified that he applied alcohol by means of gauze swabs held in the forceps (Ex. 5) to the vertical surfaces of the buttocks facing him and to the level surface of the lower part of the abdomen up to the hair line. The whole area so swabbed would be about twelve inches in diameter. He could

not say how many times he dipped the swabs into the bowl of alcohol or how much alcohol he had used for this purpose. Miss Rowe thought that possibly an ounce of alcohol had been used. There did not, the defendant testified, appear to be any excess quantity of alcohol on the patient's skin or on the towel under the indifferent electrode. He denied that any alcohol had been spilled on the patient or that he had told the plaintiffs that some alcohol had been spilled; and Miss Rowe testified that no alcohol had been spilled before or during or after the operation. The defendant admitted, however, that the alcohol applied would either evaporate or run down to whatever was underneath the patient's buttocks.

Having thus sterilized the surfaces mentioned above, he then, the defendant testified, assisted the nurse in putting on the sterilized drapes, an operation which he stated would occupy from sixty to ninety seconds. The patient having been covered by the drapes, the defendant, as he stated in evidence, took two or three minutes to evert the tumour with the wooden applicator and get the forceps on it. He then applied the needle or active electrode to the tumour in the manner already described, and had removed the tumour with the forceps, taken his foot off the switch pedal and turned sideways to place it on the table behind him, when out of the corner of his eye he saw Dr. Sullivan, who was holding the labia apart with his fingers, make a start and draw his hand away. He asked Dr. Sullivan if he had got a shock. Dr. Sullivan answered, "No; there is something hot." The defendant said he thought there was a short circuit. He then glanced at the machine and the wire; he still held the active electrode in his hand. He and Dr. Sullivan then proceeded to pull off the drapes, an operation which the defendant testified occupied fifteen seconds; and just as he got the drapes off, he saw an alcohol flame around the metal plate at the base of the buttocks flicker out. He could not say whether this flame was above the plate or underneath it. His assistant, Dr. Sullivan, then threw some water at the point where the flame had been seen. The active electrode (Ex. 4), the defendant testified, cuts better if there is a minute separation between it and the tissue to be cut. It produces minute sparks. His face, the defendant stated, was fifteen inches from the site of the operation. There was, he testified, no contact between the needle or active electrode and any surface covered by alcohol, and no ignition

during the operation. If a flash had occurred, he could not have helped but see it. He could not recall any smell of alcohol vapour; he did not think a spark from the needle would be sufficient to ignite alcohol vapour. The flame which he saw was hidden by the drapes, and nothing could be seen until the drapes were removed. The flicker might have been caused by a spark between the patient's body and the plate. Some alcohol might have lodged on the plate or the towel under it. If a drop or perspiration had occurred near the edge of the buttocks and the metal plate (Ex. 3), it might have caused a spark which would ignite any residuum of alcohol lodged on the plate or the towel underneath it.

The defendant stated that he had performed this operation hundreds of times for the past twenty years, using a similar instrument, and that no mishap had occurred to his knowledge before.

Under cross-examination, the defendant admitted that there was no necessary connection between the removal of the urethral caruncle and the burning of the patient's buttocks; that the drapes were put on the patient after he had finished swabbing the lower part of the abdomen up to the hair line and the buttocks with alcohol; that the alcohol applied below the pelvic bone would run down on each side of the vulva or the groins; and that after putting on the drapes, which would occupy from sixty to ninety seconds, he then proceeded to get ready to operate. In his examination for discovery (Q. 208), the defendant had further admitted that, immediately before the drapes were put in place, he had not made any examination or investigation to see whether there was alcohol remaining either on the patient's body or on the plate (Ex. 3) or on the towel under the plate.

The defendant further admitted in confirmation of what he had stated in his examination for discovery that the burns which the patient suffered were caused by the ignition and burning of alcohol, and that the alcohol ignited was some of the alcohol he had applied to the body of the patient; see examination for discovery QQ. 192, 193, 194, 198, 204. He guessed there was some alcohol on the towel immediately beneath the metal plate (Ex. 3): see QQ. 201, 202, 203 of examination for discovery. What caused the alcohol to ignite was something emanating from the whole machine, not a spark from the needle but a spark from

the point of contact of the buttocks with the metal plate (Ex. 3). Sometimes a spark occurred between the patient's body and the metal plate (Ex. 3); it had occurred with other doctors to his knowledge, but not in his experience, and caused a pin-point burn. On the other hand, in his examination for discovery (QQ. 217, 218), the defendant had admitted that the active electrode, when brought in contact with the tissues of the patient, caused some sparks, and that if there was either free alcohol or alcohol vapour at the spot where the spark occurred, he would expect it to ignite. Furthermore, he also had admitted he could not think of anything that could have ignited the alcohol other than the use of the electrode; see Q. 235.

The defendant also admitted that he had seen and also signed the medical history of the plaintiff Violet M. Crysler's case prepared by Dr. H. J. Sullivan (Ex. 8), but had not noticed Dr. Sullivan's statement that "the electro cautery ignited the alcohol in the prep." The defendant thought Dr. Sullivan must have meant by that statement the whole "ensemble"—the whole machine. He thought he probably had discussed the cause of the flame with Dr. Sullivan before he, the defendant, signed the report.

Five medical experts gave evidence: For the plaintiffs Dr. Allen Greenwood and Dr. John C. Ball of St. Catharines; and for the defendant three others, all of the city of Toronto, Dr. Robert Wesley, chief of the department of gynaecology and obstetrics in the Western Hospital; Dr. Frank J. O'Leary, of the medical staff of St. Michael's Hospital in the department of gynaecology and obstetrics; and Dr. Waring Cosbie, senior surgeon in the department of gynaecology and obstetrics at the Toronto General Hospital.

Without reviewing the expert medical testimony in detail, I propose to direct attention to what I consider to be the highlights of that testimony:

1. All of the surgeons agreed that it was proper practice to sterilize the surfaces surrounding the site of the operation with an alcohol solution. Dr. Greenwood stated that the alcohol solution which he used was mercurochrome or iodine dissolved in alcohol, or pure alcohol. Dr. Wesley stated that the best sterilizer was pure alcohol, and that every other one used had at least 50 per cent. alcohol. Dr. O'Leary stated that he had al-

ways used an alcohol solution containing picric acid, which was 70 per cent. pure alcohol.

2. Dr. Greenwood stated that he had always tried, ever since he started to practice, to make sure that no excess quantity of alcohol was left underneath the patient. He had always wiped the patient off with dry sterile swabs and placed a dry sterile towel under the buttocks.

Dr. Ball stated that he took care not to use an excessive quantity of alcohol and to wipe off any excess quantity of alcohol applied. He also placed a dry sterile towel underneath the patient. It was, in his view, only common sense to make sure there was no alcohol left in the vicinity—that is, within 12 inches—of a red-hot instrument like the cautery.

Dr. O'Leary thought it was rather difficult to insert sterile towels under the patient. He had seen some surgeons do this, but he does not himself do it. The insertion of towels underneath the patient might spoil the conductivity if they got between the patient's body and the plate.

Dr. Wesley stated also that he did not place a sterile towel under the patient's hips or wipe off the surfaces surrounding the site of the operation to which the alcohol solution was applied, as, in his opinion, this would spoil the technique of the operation. He had never heard of an active electrode causing a fire.

3. Dr. Wesley, Dr. O'Leary, and Dr. Cosbie all expressed the opinion that the operation Dr. Pearse had performed had been performed in accordance with the proper and usual practice.

Dr. Wesley admitted, however, that if the operation were done by a competent surgeon, there should be no burning of the patient's buttocks. He, himself, used just as little alcohol as he need use, *i.e.*, only enough to sterilize the area required to be sterilized.

Dr. O'Leary also stated that he applied enough of the alcohol solution to sterilize the area involved. He conceded that in the present case the accident would not have happened unless alcohol had been present on the sheet or towel under the plate; and if a dry sterile towel had been inserted under the patient, perhaps the accident would not have happened. Using alcohol as a sterilizing solution, and afterwards using an electric needle that produced a spark, he did not consider a risk. He could hardly

credit that alcohol had caught fire from the electrode Dr. Pearse had used, although he thought the fire was caused by some electric spark igniting alcohol. He considered it a very surprising occurrence.

Dr. Cosbie stated he had never heard of a fire occurring in such an operation. He did not consider there was any danger in the use of an active electrode. He thought the cause of the fire in the present instance was some faulty behaviour in the mechanism. He could not see the possibility of a spark emanating from the indifferent electrode. He could not conceive of sufficient alcohol dripping down on the plate or towel underneath it to be ignited by a spark. He admitted, however, that he would wait, before proceeding to operate, until he felt reasonably sure the alcohol applied had evaporated. Moreover, he also admitted that if one were going to put alcohol on the body of a patient and immediately apply a spark to operate, this would be improper practice.

The plaintiff Violet M. Crysler testified that she first learned of the burns which she had sustained from the defendant as she was coming out of the ether, and that the defendant said to her, "We had an accident, I burned you." She further testified that two or three days later she asked him what had happened and that the defendant said, "We spilled the alcohol which was ignited by the electric torch or needle."

The plaintiff Henry C. Crysler testified that he had had a conversation by telephone with the defendant on the Thursday, 7th January, following the operation, that he asked him what had happened and the defendant stated they had had an accident, they had spilled alcohol and the electric needle had caused a flash which ignited the alcohol and caused the burns to his wife's buttocks. He further testified that he saw the defendant again on Sunday, 10th January, and that the defendant then repeated the same explanation of the mishap, that is, that an electric needle had ignited spilled alcohol.

The defendant, as has already been stated, denied that he had told either of the plaintiffs that any alcohol had been spilled on the occasion of the operation. He stated that he had told Mrs. Crysler some alcohol had caught fire and caused the burns. Miss Molly G. Rowe, head nurse in attendance at the time of the operation, corroborating his evidence, testified that no alcohol was spilled before, during or after the operation. I

am disposed to accept the defendant's testimony on this point; I am inclined to think the plaintiffs probably misunderstood what the defendant told them in explanation of the accident which had occurred.

It is now pertinent to inquire what standard or degree of competence and care the law requires of a surgeon who undertakes to perform an operation on a patient. In *Rex v. Bateman* (1925), 41 T.L.R. 557 at 559, 19 Cr. App. R. 8, Lord Hewart C.J., delivering the judgment of the Court of Criminal Appeal in England, after citing a series of decisions, enunciated the governing principle in the following passage:—

“The law as laid down in these cases may be thus summarized:—If a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that the service be rendered for reward. It is for the Judge to direct the jury what standard to apply and for the jury to say whether that standard has been reached. The jury should not exact the highest, or a very high, standard, nor should they be content with a very low standard. The law requires a fair and reasonable standard of care and competence. This standard must be reached in all the matters above mentioned.” At the same time it is to be borne in mind that a surgeon does not become an actual insurer; he does not undertake that he will perform a cure, nor will he be liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way. *Hancke v. Hooper* (1835), 7 Car. & P. 81 at 84, 173 E.R. 37; *Rich et ux. v. Pierpont* (1862), 3 F. & F. 35 at 40, 176 E.R. 16; *Lanphier et ux. v. Phipos* (1838), 8 Car. & P. 475 at 479, 173 E.R. 581; see also *Marshall v. Rogers*, [1943] 4 D.L.R. 68 at 72, [1943] 2 W.W.R. 545.

The question remains, then, whether on the evidence the defendant did exercise a fair and reasonable degree of care and competence. In my opinion, certain admissions which the de-

fendant made in his evidence have a crucial bearing upon the determination of this issue. The defendant admitted:

(1) That the burns which the plaintiff Violet M. Crysler suffered were caused by the burning of alcohol.

(2) That the alcohol which ignited, and the burning of which caused the injuries to the said plaintiff, was some of the alcohol solution which he had applied to the surfaces of the said plaintiff's body surrounding the site of the operation.

(3) That to his knowledge (though not within his own experience) other doctors, in performing the same operation, by the same method, had reported the occurrence sometimes of sparks (caused by a short circuit) between the edge of the patient's buttocks and the indifferent electrode, which manifested themselves in pin-point burns of the patient's flesh.

Admissions 1 and 2 appear, in my view, clearly to justify the inference that Dr. Pearse, in sterilizing the surfaces of the patient's body surrounding the site of the operation, applied an excessive quantity of alcohol, and that some of the alcohol so applied dripped down on to the metal plate, the indifferent electrode (Ex. 3), or on to the towel under the plate.

Admission 3 is an acknowledgment by Dr. Pearse of the fact that to his knowledge (from what other doctors had told him) sparks have on occasion occurred between the edge of the patient's buttocks and the indifferent electrode, and have been of sufficient thermal intensity to cause pin-point burns of the patient's flesh.

Yet, notwithstanding the significance of the inferences to be drawn from these admissions on his part, Dr. Pearse failed to take or observe any of the precautions which may, on a fair appreciation and analysis of the expert medical testimony, be taken to have been indicated as reasonable and proper precautions to take or observe under the circumstances of this particular operation:

1. He did not take care to see that an excessive quantity of the alcohol solution was not applied to the patient's body: evidence of Dr. Greenwood, Dr. Ball, and Dr. Wesley.

2. He did not take care to swab off with dry sterile swabs or a dry sterile towel any excess quantity of the alcohol solution which may be taken to have been so applied: evidence of Dr. Greenwood and Dr. Ball.

3. He did not wait for the alcohol solution which he so applied to evaporate before proceeding with the operation: evidence of Dr. Cosbie.

4. He did not take care to see that dry sterile towels were inserted under the said patient's buttocks to absorb any excess quantity of the alcohol solution which might drip down off the patient's body on to the indifferent electrode or the towel under it: evidence of Dr. Greenwood and Dr. Ball.

5. He did not, after the alcohol solution was applied to the patient's body, and before the drapes were placed on her, make any examination or investigation to see whether there was any alcohol solution remaining either on the patient's body or on the indifferent electrode (Ex. 3) or on the towel under the electrode, so as to make sure he could proceed to perform the operation without danger of causing injury from burns to the patient: evidence of Dr. Pearse, Dr. Greenwood and Dr. Cosbie.

None of these precautions did the defendant take or observe.

On these grounds, founded upon my appreciation of the whole of the evidence, and more particularly the evidence of the defendant, and of the medical experts, I feel clearly justified in finding that the defendant was unskilful and negligent, and that his want of skill and care caused the injury of which the plaintiffs complain, in that he failed to use any of the proper and reasonable precautions which a surgeon of ordinary skill and prudence (and still more so, a surgeon who professed to possess special knowledge and skill in this particular branch of surgery, urology) would take, or, at any rate, might reasonably be expected to take, to avoid the ignition and burning of alcohol applied by him to the plaintiff Violet M. Crysler's body for the purpose of sterilizing the areas surrounding the site of the operation.

The plaintiffs found their cause of action upon the following allegations set out in the statement of claim:—

“6. The Plaintiffs say that at a time when the Plaintiff, Violet M. Crysler, was unconscious and in the care and under the control of the Defendant, the Defendant without justification or excuse caused severe burns to the person of the Plaintiff, Violet M. Crysler, and was thereby guilty of trespass to the person, causing damage to the Plaintiffs.

“7. In the alternative the Plaintiffs allege that the defendant was negligent in that:

“(a) He allowed inflammable material in the form of alcohol or some other similar substance to drop on pads or towels on which the Plaintiff, Violet M. Crysler, was resting at the time of the operation, knowing that he would be using cauterizing apparatus which would be likely to cause this inflammable material to burst into flame, which flame caused the burns.

“(b) He used a cauterizing apparatus without first taking steps to assure himself that this could be done with safety to the Plaintiff, Violet M. Crysler.

“8. In the further alternative the Plaintiffs say that the injuries suffered by the Plaintiff, Violet M. Crysler, were such as in the ordinary course of things would not have been sustained if the Defendant had exercised proper care and that the facts are such that the maxim: *res ipsa loquitur* applies, and that the onus is upon the Defendant to shew that the said injuries did not result from want of care on his part.”

In support of the plea of trespass to the person Mr. Cartwright cited the well-known case of *Stanley v. Powell*, [1891] 1 Q.B. 86. That decision is only important for the proposition that in trespass the defendant must affirmatively prove that he was not negligent.

In opposition to this plea, Mr. McCarthy contended that an action for trespass to the person will not lie in any case where, the relation of doctor and patient having been established between the plaintiff and the defendant, the plaintiff seeks to recover damages for mistakes, negligence, or improper treatment on the part of the defendant in the performance of professional services either requested or rendered under an implied contract or under a mistaken interpretation of an express or implied contract. Mr. McCarthy cited in support of this submission the decision of Orde J.A. in *Boase v. Paul*, 66 O.L.R. 237, [1931] 1 D.L.R. 562, which was affirmed on appeal [1931] O.R. 625, [1931] 4 D.L.R. 435.

In support of the plea of *res ipsa loquitur*, Mr. Cartwright cited the classical statement of this doctrine in *Scott v. London and St. Katherine Docks Company* (1865), 3 H. & C. 596, 159 E.R. 665, and the judgments of MacKinnon and Goddard, L.JJ., in *Mahon v. Osborne* (a malpractice swab case), [1939] 2 K.B. 14 at 38, 50, and *McFadyen et al. v. Harvie et al.*, [1941] O.R. 90, [1941] 2 D.L.R. 663, affirmed [1942] S.C.R. 390, [1942] 4 D.L.R. 647. He further argued that the onus of proof in any

event was, on the facts proved in the case at bar, on the defendant, as the circumstances relating to what had happened in the course of the operation were wholly and peculiarly within the knowledge of the defendant, citing *Pleet v. Canadian Northern Quebec R.W. Co.* (1921), 50 O.L.R. 223 at 227, 64 D.L.R. 316, 26 C.R.C. 227. On the other hand, as being opposed to any application of *res ipsa loquitur* doctrine in malpractice cases, and as supporting the view that the burden of proof is on the plaintiffs, Mr. McCarthy cited the decision of Falconbridge C.J. in *Town v. Archer et al.* (1902), 4 O.L.R. 383 at 387; *Hutchinson et al. v. Robert*, [1935] O.W.N. 314 at 315, and *Clark v. Wansbrough et al.* [1940] O.W.N. 67 at 72.

These rival contentions are all really concerned with the one issue, whether in an action of this nature the onus of proof is on the plaintiffs, or is on the defendant; whether the plaintiffs, in order to be entitled to recover, must show by affirmative evidence, first, that the defendant was unskilful and negligent; and, secondly, that his want of skill and care caused injury to the plaintiff Violet M. Crysler; or, whether, the plaintiffs having proved that the injury of which they complain was caused by burns suffered in the course of an operation performed by the defendant, the onus was then on the defendant to prove that the burns were not caused by any negligence on his part.

The evidence led by the plaintiffs and adduced under cross-examination of the defendant, and of the witnesses called on his behalf, relieves me in my judgment of the necessity for entering upon any discussion of the issues so raised touching the burden of proof. They are interesting questions, susceptible of considerable discussion, whether an action for trespass to the person will lie, or whether the doctrine of *res ipsa loquitur* is applicable in malpractice cases, or whether in the circumstances of this case the onus of proof is, at any rate, on the defendant upon the principle applied in *Pleet v. Canadian Northern Quebec R.W. Co.* (*supra*). But, in my view, these questions do not call for determination in the present case. The allegations of negligence set out in para. 7 of the statement of claim are, I am satisfied, sufficient in themselves to support the plaintiffs' action; and these allegations the plaintiffs, without regard to any question touching the onus of proof, have made good. The plaintiffs have, in my opinion, proved by affirmative evidence that the injuries suffered by the plaintiff Violet M. Crysler were caused by the

negligence of the defendant. For such negligence he must, accordingly, respond in damages.

"It is" I desire to add in the words of Goddard L.J., in *Mahon v. Osborne*, [1939] 2 K.B. 14 at 50, "no disparagement of the devoted and frequently gratuitous service which the profession of surgery renders to mankind to say that its members may on occasion fall short of the standard of care which they themselves, no less than the law, require."

I assess the damages of the plaintiff Henry C. Crysler at the sum of \$1844.70: \$1344.70 for out-of-pocket expenses, which were, in my opinion, reasonably and necessarily incurred by him for treatment of the burns suffered by his wife, and \$500 for loss of *consortium*.

I assess the damages of the plaintiff Violet M. Crysler, for pain and suffering, and such permanent disability as she may have, at the sum of \$3,000.

Judgment for plaintiffs with costs.

Solicitors for the plaintiffs: Collier & Schiller, St. Catharines.

Solicitors for the defendant: McCarthy & McCarthy, Toronto.

[COURT OF APPEAL.]

**Randall v. Prest; Hamilton Street Railway Company
(Third Party).**

Parties—Third Party Notice—Employer of Injured Workman Suing in his Name under The Workmen's Compensation Act, R.S.O. 1937, c. 204, s. 8(3)—Third Party Notice Served on Employer—Propriety—Effect of The Negligence Act, R.S.O. 1937, c. 115.

A workman, having been injured while at work, elected to claim compensation under The Workmen's Compensation Act, R.S.O. 1937, c. 204. His employer, having paid compensation, brought an action in his name, under s. 8(3) of the Act, against the defendant, who was alleged to have caused the injuries by his negligence. The defendant, desiring to contend that the injuries were caused wholly or in part by the negligence of the employer as to the conditions of the workman's employment, issued a third party notice against the employer. *Held*, Laidlaw J.A. dissenting, the third party notice should not be struck out. There were two issues to be tried, and while there would be no difficulty in determining the defendant's responsibility towards the nominal plaintiff, it would be difficult to determine to what extent, if any, the employer's negligence contributed to the damage, without having the employer formally before the Court. The fact that it was the real plaintiff did not affect the advisability of making it a party in its own name.

AN appeal, by leave of Rose C.J.H.C., from an order of Greene J., dismissing an appeal from an order of Schwenger Co. Ct. J., sitting as local judge of the Supreme Court, striking out a third party notice.

The nominal plaintiff, an employee of Hamilton Street Railway Company (hereafter referred to as "the Street Railway"), was injured by the defendant's automobile. He elected to claim compensation under The Workmen's Compensation Act, R.S.O. 1937, c. 204. The Street Railway, having paid the compensation, brought an action in the plaintiff's name against the defendant, by virtue of s. 8(3) of the Act. The defendant, alleging that the Street Railway was or might be partly responsible for the damage claimed, by reason of its negligence in directing the plaintiff to work where he had, without sufficient protection, served a third party notice on the Street Railway.

The reasons for judgment of the local judge were in part as follows:

5th June 1943. SCHWENGER Co. Ct. J [after stating the facts]:—This case would fall squarely within the case of *Healy v. Runnymede Iron and Steel Co. et al.*, [1941] O.R. 133, [1941] 3 D.L.R. 325, except that in that case the plaintiff Healy was the plaintiff in fact, never having elected to take compensation under The Workmen's Compensation Act, and therefore the

Bell Telephone Company of Canada, which was the plaintiff's employer and the third party added in the case, was not entitled to the statutory subrogation conferred by s. 8 of the Act.

Mr. Bowlby asks on behalf of the Hamilton Street Railway Company that the Street Railway, being by statute the plaintiff in this action, and by statute authorized to bring this action in the name of the nominal plaintiff, Thomas E. Randall, should not be added as a third party, and thus placed in the position of being called upon to defend its own action.

The purpose of third party procedure is to avoid multiplicity of actions, in so far as a party added as a third party becomes bound by estoppel, as one of the parties in the cause, by the findings as between the plaintiff and the defendant on a consideration of the issues between the defendant and the third party. Third party procedure is a rule of convenience.

That Thomas E. Randall by virtue of the combined effect of ss. 8 and 14 of The Workmen's Compensation Act—personally has no right of action, once he elects to take compensation, is clear. That his employer, the Hamilton Street Railway Company, is in fact *dominus litis* in this action also appears to be the case. See *Cooper v. Canadian Northern Ontario Railway Co.* (1924), 55 O.L.R. 256.

I am, therefore, of the opinion that without being added as a third party the Hamilton Street Railway Company would be estopped as against the defendant from disputing the findings in this action. See 4 C.E.D. (Ont.), p. 371, s. 53, and cases there cited. The degrees of negligence, if any, between the defendant and the Street Railway can be determined in this action without the latter being added as third party. See The Negligence Act, R.S.O. 1937, c. 115, s. 2. The only convenience to the defendant of third party proceedings is the right to have the question whether or not the Street Railway is liable to bear a share of the damages determined at the same time in the one action, as against doing so later by separate proceedings. This question is contingent upon a finding that both the defendant and the Street Railway were in some degree negligent.

As against this convenience to the defendant is the inconvenience and embarrassment caused to the Street Railway by being placed in the position of instituting the action under the statutory powers conferred by s. 8 of The Workmen's Compensation Act, and then being called upon to defend the action under

third party proceedings. I am of the opinion that the preponderance of convenience is undoubtedly against the third party notice standing, and do therefore order the same set aside.

22nd June 1943. An appeal by the defendant was dismissed by GREENE J. without written reasons. The reasons for granting leave to appeal from the order of Greene J. were in part as follows:

10th September 1943. ROSE C.J.H.C. (orally, after pointing out that, since Greene J. had not given reasons in writing, it was necessary to consider the reasons of the local judge):—What the local judge says about the purpose of third party procedure in general being to avoid multiplicity of actions and being a procedure of convenience is, I think, unquestionable, and I cannot see any fault to be found with his statement that if the Railway is maintaining this action, it is, as he puts it, *dominus litis*. I do doubt, however, the correctness of his statement that in this proceeding the degrees of negligence of the defendant and the Railway respectively—supposing both were negligent—can be determined without the presence of the Railway before the Court. The degree of negligence of a person who is not before the Court can, under s. 2 of The Negligence Act, R.S.O. 1937, c. 115, be determined in certain cases in which the absent person will not be hurt by the determination. But there is no other case of which I have knowledge in which the degree of negligence of a person who is not before the Court in some capacity can be determined. Questioning then the learned judge's statement just quoted, I think there is good reason to doubt the importance attached to the embarrassment that might be caused to the Railway if it is kept before the Court, and having regard to the desirability, established by a long succession of cases, of having all questions determined, as far as practicable, in the one proceeding, I think it is at least arguable that if the other conditions precedent to the bringing in of the Railway are complied with, the Railway ought to be kept before the Court.

Those conditions are, under s. 5 of The Negligence Act, R.S.O. 1937, c. 115, as amended by 1939, c. 47, s. 23, which amendment was made very soon after the decision in *Sauriol v. Summers*, [1939] O.R. 253, [1939] 2 D.L.R. 297, that it shall appear that a person not already a party to an action is or may be wholly or partly responsible for the damages claimed, and my great

difficulty with the case has been to say whether the Railway, not is responsible, but may be responsible in whole or in part for these damages which the plaintiff is claiming from the defendant. I can see all sorts of difficulties in the way of a determination, at the trial or elsewhere, that the Railway is so responsible. There is, first of all, The Workmen's Compensation Act. Then there is the defendant's pleading and the comparison which Mr. Bowlby has made of para. 3 and para. 5(a) of the statement of defence, and there are other difficulties. But the relevant cases are full of the warning to which Middleton J.A. referred in *Healy v. Runnymede Iron and Steel Co. et al.*, [1941] O.R. 133, [1941] 3 D.L.R. 325, and to which Kelly J. referred even more fully in the same case, against determining rights in chambers rather than at a trial. As Middleton J.A. put it in the *Healy* case (which was a case very like the present in some respects), unless it could be said that the defendants were so clearly entitled to no remedy against the Bell Telephone Co. as to bring it altogether outside of the statute, the adding of the telephone company ought not to be interfered with.

As I have said, I am very doubtful indeed, on the pleadings and what I have heard of this case, as to whether there is any liability on the part of the Railway either to the plaintiff or to the defendant, but the question of the defendant's right against the Railway—that is, assuming that the defendant is found liable for payment—is somewhat complicated, and without going so far as to say, or even to think, that the local judge and my brother Greene were wrong in the course that they followed, I do think that it can be said, and ought to be said, that there is good reason to doubt the correctness of their decisions, and that leave to appeal ought to be granted, if the other conditions prescribed by Rule 493(3)(b) exist, that is to say, if the appeal involves matters of such importance that, in the opinion of the judge, leave to appeal should be given. The appeal certainly involves matters of importance to the parties to the action, and I think that when you consider the fact that the question here is, in a sense, another branch of the question that has been dealt with already by the Court of Appeal in the *Sauriol* and *Healy* cases, and that it is desirable that there should be a complete code of procedure to be followed in cases of this type, it can be said that the case is of such general importance as to make it desirable that the matter should come before the Court of Appeal.

14th October 1943. The appeal was heard by RIDDELL, HENDERSON and LAIDLAW JJ.A.

T. J. Agar, K.C., for the defendant, appellant: The circumstances of this case are exceptional, and if this order is allowed to stand it will defeat the ends of justice and manifestly prejudice a proper trial. There are two cases only, under s. 2 of The Negligence Act, R.S.O. 1937, c. 115, where findings of negligence may be made against a person who is not a party to the action, and as pointed out by Rose C.J.H.C. they are both cases in which such person cannot be hurt by the finding. In no other case is there jurisdiction to make a finding of negligence against a person who is not a party. The 1939 amendment to s. 5 of The Negligence Act is of great significance in the light of the facts of this case. It is unreasonable to force the appellant to trial without having the Street Railway before the Court, when it is possible that a jury might find that it was guilty of negligence contributing to the accident.

Rights of parties should be determined, not in chambers, but at a trial: *Healy v. Runnymede Iron and Steel Co. et al.*, [1941] O.R. 133, [1941] 3 D.L.R. 325. The rights of the parties should all be adjudicated upon in the same forum and at the same time. [LAIDLAW J.A.: Did not the trial judge exercise a discretion which was his to exercise, and if so must you not show that injustice will be done to you if the order is not reversed?] It is our statutory right to be here and ask that the Street Railway be added as a third party. Even if the order is discretionary, the trial judge acted on a manifestly wrong ground. The nominal plaintiff cannot sue, but the Street Railway has become subrogated in his rights and is entitled to maintain the action in his name; it is *dominus litis*: *Cooper v. Canadian Northern Ontario Railway Co.* (1924), 55 O.L.R. 256.

C. W. R. Bowlby, K.C., for the third party, respondent: It is clear that the Street Railway is in fact the real plaintiff in this action. The plaintiff is bound by the cardinal rule that a third party cannot be added if embarrassment is caused. Obviously this would be the case if we were compelled to appear in a dual capacity. As third party, we must minimize the damages which we are claiming as plaintiff: *Bower v. Hartley et al.* (1876), 1 Q.B.D. 652; *Wye Valley Railway Company v. Hawes* (1880), 16 Ch. D. 489; *Holmsted and Langton*, Ontario Judicature Act, 5th ed., p. 774.

Two judges having exercised their discretion by striking out the third party notice, this Court should not interfere: *Martin v. Deutch et al.*, [1943] O.R. 683. [LAIDLAW J.A.: The question is whether this order was discretionary; is the position affected by s. 5 of The Negligence Act?] If there were a legal right to have anyone added, there would not be so much controversy. In every case, whether under Rule 165 or under s. 5 of The Negligence Act, there is an onus on the defendant to show why the third party should be added: *Healy v. Runnymede Iron and Steel Co.*, *supra*, at p. 139 (O.R.). The defendant's own statement of defence discloses reasons why a third party should not be added. [HENDERSON J.A.: It is an open question whether or not there is a duty on the part of the Street Railway, when sending employees out to work in the streets at night, to see that they are protected. One of the disadvantages of striking out a third party notice on a motion in chambers is that this is left undecided. Such questions should be disposed of at trial.]

This case is distinguishable from the *Healy* case in three respects: (a) the third party notice there was issued under s. 5 of The Negligence Act, and here it was under Rule 165; (b) there the nominal plaintiff was the real plaintiff, and there was no subrogation; (c) there the defendant showed a *prima facie* claim for contribution against the proposed third party.

F. Morison, K.C., for the plaintiff, respondent: As a matter of practice, Randall was entitled to sue the defendant. He would be embarrassed by having the Street Railway added as a third party. S. 8(3) of The Workmen's Compensation Act entitles him to sue in his own name. I refer also to *Emard v. Mason et al.*, [1943] O.W.N. 378.

T. J. Agar, K.C., in reply: S. 5 of The Negligence Act alters the practice as to parties who may be added, despite the provisions of The Workmen's Compensation Act. The old authorities as to discretionary orders do not apply in view of this section. Even if the order is discretionary, we are entitled to have it set aside if we show that it was based upon a wrong principle. The balance of convenience is in our favour.

Cur. adv. vult.

27th October 1943. RIDDELL J.A.:—In this appeal, the facts are not in dispute. Randall, the named plaintiff, was working

as a labourer in the employ of the Hamilton Street Railway, when he was injured by the car driven by the defendant Prest. By a formal document he elected to claim compensation from his employers under The Workmen's Compensation Act, and under s. 2 of that Act the employer paid and is still paying compensation to him. The plaintiff signed and delivered a formal document of his election, and brought no action against the alleged wrongdoer.

The Street Railway, becoming subrogated to all the plaintiff's rights under the Act, s. 8(3), brought this action in the plaintiff's name. The defendant, desiring to contend that the company contributed to the accident, did not apply, as it might have done, under The Negligence Act, R.S.O. 1937, c. 115, s. 5, for an order adding the Street Railway as a third party, but served a third party notice under Rule 165. The notice is very specific. It reads thus:

"The defendant, Norman Prest, claims to be entitled to contribution and indemnity and relief over against you in that you are or may be wholly or partly responsible for the damages claimed, by reason of your negligence in directing the plaintiff and in permitting the plaintiff to be in a dangerous position on the travelled portion of Burlington Street without giving to your employee, the plaintiff, any protection from approaching vehicular traffic by means of lights, flares or other warnings.

"AND TAKE NOTICE that, if you wish to dispute the plaintiff's claim in this action as against the defendant, Norman Prest, or your liability to the defendant, Norman Prest, you must cause an Appearance to be entered for you within ten days after service of this notice.

"In default of your so appearing, you may be deemed to admit the validity of any judgment obtained against the defendant, Norman Prest, and your own liability to contribute or indemnify to the extent herein claimed which may be summarily enforced against you."

The railway company launched a motion to strike out the third party notice, and Schwenger Co. Ct. J., Local Judge at Hamilton, in a carefully considered judgment, made an order setting it aside. His judgment was supported in an appeal by Greene J.; the Chief Justice of the High Court giving leave to appeal, the appeal came before us, and was argued with quotation of authorities.

After reading these authorities, I think that the appeal should be disposed of on elementary principles.

It is, I think, obvious that there are to be decided two matters: first, was the defendant responsible to the plaintiff, and if so, to what amount, and second, was the defendant entitled to contribution from the railway company?

While the first of these issues can well be tried without bringing the railway company in as a formal party, there would be difficulty in determining the second without having the company explicitly before the Court. It would not, I think, be proper to go into this matter fully without it being a party; and the fact that it is prosecuting the action in the name of its employee does not remove the advisability of its being a party in its own name.

I would allow the appeal with costs throughout.

HENDERSON J.A. agrees with RIDDELL J.A.

LAIDLAW J.A. (*dissenting*):—This is an appeal by the defendant, by leave of Rose C.J.H.C., from an order of Greene J., dated 22nd June 1943, dismissing an application by way of appeal from an order made by Schwenger Co. Ct. J., of the County of Wentworth, whereby a third party notice issued by the defendant, and served upon the Hamilton Street Railway Company was set aside.

The plaintiff was an employee of the Hamilton Street Railway Company, and in the course of his employment on Burlington Street, in the city of Hamilton, on 26th March 1941, was struck and injured by a motor vehicle owned and operated by the defendant. It is alleged in the statement of claim that the accident, and damages resulting therefrom, were caused by negligence of the defendant. The defendant denies negligence on his part, and says in his statement of defence "that the accident was caused through the negligence of the plaintiff" and "further alleges that the said accident was caused by the negligence of Hamilton Street Railway Company, the employers of the said plaintiff". Particulars of the negligence alleged by the defendant as against the plaintiff and the Hamilton Street Railway Company are set forth in the statement of defence. The defendant further alleges "that the plaintiff in any event is not entitled to maintain this action against the defendant in that he has elected to claim compensation under the provisions of The Workmen's

Compensation Act, R.S.O. 1937, Chapter 204, and has in fact received such compensation, and the defendant pleads the provisions of Section 8 of the said Act." The defendant also pleads the provisions of The Negligence Act, R.S.O. 1937, c. 115, and amendments thereto.

The defendant applied for, and had issued, a third party notice under Rule 165 of the Rules of Practice. The plaintiff thereupon applied to His Honour Judge Schwenger, in chambers, for an order striking out the third party notice and service thereof. In support of that application the affidavit of the secretary of the Hamilton Street Railway Company was filed, and showed, *inter alia*, that "The Plaintiff elected to claim compensation under The Workmen's Compensation Act and has been paid and is being paid compensation under the said Act", also "The said Railway Company is an employer included in schedule 2 to the said Act and is therefore liable individually to pay the said compensation and individually has been and is paying the said compensation."

The learned judge held that "The degree of negligence, if any, between the defendant and the Street Railway can be determined in this action without the latter being added as third party. . . . The only convenience to the defendant of third party proceedings is the right to have the question whether or not the Street Railway is liable to bear a share of the damages determined at the same time in the one action, as against doing so later by separate proceedings. This question is contingent upon a finding that both the defendant and the Street Railway were in some degree negligent." He says, "As against this convenience to the defendant is the inconvenience and embarrassment caused to the Street Railway by being placed in the position of instituting the action under the statutory powers conferred by s. 8 of The Workmen's Compensation Act, and then being called upon to defend the action under third party proceedings." His conclusion was "that the preponderance of convenience is undoubtedly against the third party notice standing." Greene J. did not give reasons in writing for judgment, but in order to protect the defendant against a statutory defence in event of a future claim by the defendant against the railway company, that a claim for contribution or other relief is barred by lapse of time, as provided by s. 60 of The Highway Traffic Act, R.S.O. 1937, c. 288, he accepted from counsel for the Hamil-

ton Street Railway Company, and included in the order of the Court, an undertaking that such a defence would not be raised.

There can be no doubt that the Hamilton Street Railway Company is the real plaintiff in this action. It became subrogated to the rights of the injured employee against the defendant, and entitled to maintain an action in the name of the employee: R.S.O. 1937, c. 204, s. 8. The benefits of the litigation belong to the Hamilton Street Railway Company. Moreover, it is the practice, and proper in such an action, for the Court to direct payment of the proceeds to the employer (or to the Workmen's Compensation Board, if it be the real plaintiff), notwithstanding that the employer (or the Board) is not a party named on the record. *Hutton v. Toronto R.W. Co.* (1919), 45 O.L.R. 550, 49 D.L.R. 216, affirmed 59 S.C.R. 413, 50 D.L.R. 785, [1922] 1 W.W.R. 396; *McIver v. Tammi* (1921), 49 O.L.R. 179, 62 D.L.R. 534. The true plaintiff being the Hamilton Street Railway Company, the issues to be determined in the action are actually between it and the defendant. The nominal plaintiff has no monetary interest in the dispute, and the only person opposed in interest to the defendant is the Hamilton Street Railway Company. The case is clearly distinguishable on this ground from *Healy v. Runnymede Iron and Steel Co. et al.*, [1941] O.R. 133, [1941] 3 D.L.R. 325. The Court recognizes, and gives effect to, the right of the employer to the fruits of litigation of this kind, by an express direction in the judgment, as mentioned, although the employer is not before the Court in name, as a party. Likewise, I think the Court can, at the same time, deal with that right by applying to it a limitation in law attaching thereto. That limitation becomes operative if the railway company is partly responsible for the damages claimed in the action. It is my view that the degree of fault or negligence, if any, of the employer can properly be ascertained without joinder of it in the action as defendant or third party. Before the Negligence Act came into force it was a good defence in an action for damages founded on alleged negligence of the defendant, to show that negligence of the plaintiff was the sole cause of the damages, or that it was a contributory cause. A finding of contributory negligence of the plaintiff was a complete bar to relief. It was also a good defence to show that the damages claimed were caused by a third person not a party to the proceedings. After The Negligence Act came into force a finding of contributory

negligence of the plaintiff ceased to be a complete bar to recovery of any portion of the damages, but the bar was removed to an extent proportionate to the degree to which the fault or negligence of the defendant contributed to the damages. The underlying principle is that the extent of liability of a defendant is to be measured by the degree of fault or negligence attributable to him. "In an action brought for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from a motor vehicle . . . no damages, contribution or indemnity shall be recoverable for the portion of the loss or damage caused by the fault or negligence of such owner or driver" of the motor vehicle: R.S.O. 1937, c. 115, s. 2(2). It is then expressly provided that "the portion of the loss or damage so caused by the fault or negligence of such owner or driver shall be determined although such owner or driver is not a party to the action." This express provision shows that, in certain circumstances, a finding of negligence may be made against a person who is not a party to the action. In the circumstances of a case of the kind now under consideration, such a finding can likewise be made. The parties actually in dispute are before the Court, and no rights of an absent person can be prejudiced or affected.

The third party notice in this case was issued under Rule 165. When an application was made to strike out the notice, the learned judge was then called upon to exercise a judicial discretion. In the exercise of that discretion the Court must consider whether the plaintiff's interests will be prejudiced by the proposed joinder: *Bower v. Hartley et al.* (1876), 1 Q.B.D. 652 at 656, 657; *Wye Valley Railway Company v. Hawes* (1880), 16 Ch. D. 489 at 494, 495. This matter was examined by the learned judge, and he decided that there would be embarrassment caused to the Hamilton Street Railway Company by "being placed in the position of instituting the action under the statutory powers conferred by s. 8 of The Workmen's Compensation Act, and then being called upon to defend the action under third party proceedings." The Street Railway, in the name of the plaintiff, must assert a claim to a quantum of damages, and at the same time, as third party, deny or minimize that claim. By virtue of s. 14 of The Workmen's Compensation Act, *supra*, an action does not lie against the Hamilton Street Railway Company by its employee, and the railway company could not, therefore, be

joined in the action as a party defendant. Nevertheless, by joining the Street Railway as a third party this objection is indirectly avoided, but to the probable prejudice to the rights of the Street Railway, and with the conflict of interest I have described. That practice, I think, is improper and should not be permitted.

No application in the lower Court was made by the defendant for an order to add the Street Railway as a third party under the provisions of s. 5 of The Negligence Act, *supra*, as amended by 1939, c. 47, s. 23. I quote s. 5 as follows:

"5. Whenever it appears that any person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant or may be made a third party to the action upon such terms as may be deemed just."

It is argued by counsel for the appellant that upon fulfilment of the condition described in s. 5, an order to add the railway company should issue as of right—that the Court is not required, or entitled, to exercise a discretion on an application to add a party to the action. I do not agree. I think the Court is possessed of the same discretion as in a case of third party proceedings instituted under Rule 165. In my opinion, it is the duty of the Court in both cases to inquire into the question whether or not the plaintiff's interests might be prejudiced or affected. It is likewise the duty of the Court to be satisfied that the interests of the person who is *dominus litis*, and who is, in reality, the plaintiff, shall not be prejudiced or affected. An order under s. 5 does not go as of right, but depends on the discretion to be exercised by the Court in the particular circumstances of each case. Counsel asks that this Court do now entertain an application under s. 5, to add the Street Railway as a third party. Even if that course be permitted, I express the view that no order to add the Street Railway should be made, because it is not only unnecessary, but would likely cause embarrassment and prejudice to the plaintiff in fact.

There is another ground upon which I think no order should be made under s. 5 to add the railway company as a party in the action. It does not "appear" that the railway company "is or may be wholly or partly responsible for the damages claimed", as required by the statute. The defendant sets forth in the statement of defence allegations of negligence as against the railway company, but that alone is not necessarily conclusive. In this

instance, those allegations are so inconsistent and contradictory in their particulars as to make it appear that there is much doubt whether the Street Railway is, or may be, liable for the damages claimed. The essential condition upon which an order may issue has not been satisfied in this case.

Finally, it was urged that even if the order in appeal was made in the exercise of discretion, this Court should, nevertheless, reverse it. It has been held that the Court of Appeal will not set aside an order made in the exercise of discretion, unless it be made clear that an injustice would be done to the appellant if the order were permitted to stand: *Martin v. Deutch et al.*, [1943] O.R. 683. It is argued that the learned judge did not follow and apply the proper principles of law to the question under consideration by him, and, in consequence, such an injustice has been done to the appellant. I do not find any error in law in the order made by His Honour Judge Schwenger, or appearing in the reasons for his judgment. On the contrary, I am of opinion that the order is well and properly founded on the matters which required consideration by him.

The appeal should, therefore, be dismissed, with costs, including costs of the application for leave to appeal.

*Appeal allowed with costs throughout, LAIDLAW J.A.
dissenting.*

Solicitor for the plaintiff, respondent: Frank Morison, Hamilton.

Solicitors for the defendant, appellant: Walsh & Evans, Hamilton.

Solicitor for the third party, respondent: C. W. R. Bowlby, Hamilton.

[COURT OF APPEAL.]

Warren v. Yeoll.

Easements—Acquisition of Right of Way by Prescription—Nature of User Required—Walk Encroaching upon Neighbour's Land—Bona fide Mistake as to Boundary—The Limitations Act, R.S.O. 1937, c. 118, ss. 33, 34.

The parties owned adjoining lots, on each of which was a house. A concrete walk was laid between the houses, apparently by the plaintiff's predecessor in title, which encroached upon the defendant's land, and, for a considerable part of its length, was wholly upon that land. The plaintiff, and his predecessors in title, used this walk for nearly 30 years for access to the building on the plaintiff's land, but the defendant also made some use of it. In answer to the plaintiff's claim that he had acquired an easement over this walk by prescription, it was argued that the plaintiff's user of the walk was referable to a mistaken belief on his part that he owned the land upon which the walk was built, and that the user could therefore not be relied upon to establish an easement.

Held, this defence could not succeed. The principle of such cases as *Attorney-General v. Horner* (No. 2), [1913] 2 Ch. 140, and *Attorney-General of Southern Nigeria v. John Holt and Company (Liverpool), Limited et al.*, [1915] A.C. 599, was that where there had been user of land in the exercise of a right asserted, e.g., a right of ownership, which right was found not to exist, that user could not be relied upon to establish some wholly different right, such as an easement. But this principle was inapplicable where there was merely user, without any assertion of the basis of the claim. Nor was the case within the rule exemplified in *Adams v. Fairweather* (1906), 13 O.L.R. 490, where the supposed right was a claim which the defendant was not called upon to meet. It was from the nature of the acts of user that a claim to an easement must be supported. *Earl De la Warr v. Miles* (1880-1), 17 Ch. D. 535, applied; other authorities considered.

Limitation of Actions—Extinction of Title to Land by Adverse Possession—Sufficiency of Evidence—The Limitations Act, R.S.O. 1937, c. 118, ss. 4 et seq.

In an action based upon the extinction of a paper title to land by adverse possession, *held*, Henderson J.A. dissenting in this respect, the evidence of possession by the plaintiff was sufficient, in view of the nature of the property and of all the circumstances, to entitle him to judgment.

AN appeal by the defendant from the judgment of Urquhart J., after a trial without a jury.

The following statement of facts is taken from the judgment of KELLOCK J.A.:

"The appellant is the registered owner of lot 10 on the west side of Church Street, in the City of Windsor, and the respondent is the registered owner of lot 9 to the north. Upon the appellant's property there is erected a dwelling, the north-west corner thereof being some 3 feet 7 inches south of the lot line. There was no fence at any time erected upon the line dividing the lots, but from in or about the year 1915 a fence ran from the north-west corner of the appellant's dwelling to the north-east corner of a garage situate on the westerly portion of the appellant's

property, some 6 feet 8½ inches south of the lot line. This fence replaced an earlier fence which had for its westerly terminus a point somewhat north of the garage. On the respondent's lands the northerly fence did not occupy the lot line between lot 9 and lot 8 to the north, but ran diagonally from the westerly face of the building on the respondent's property, at a point slightly south of the lot line to the rear of the respondent's property, at a point some 6 feet 4 inches south of the lot line. The evidence shows that the situation with regard to fences in the neighbourhood was similar, in that the fences did not occupy the lot lines, but ran somewhat south thereof. The fence on the southerly and rear portion of the appellant's lands also was not erected on the southerly boundary of lot 10, but some distance to the south, encroaching on a public lane.

"Shortly prior to 1914, at a time when the building on the respondent's premises was re-built, a concrete walk was laid to the south of the respondent's building, turning to the north at its rear. This walk encroaches upon lot 10, and is entirely on that lot for a considerable distance. Under this walk there is a sewer, which serves both premises. Some time in the year 1941 the appellant placed a gate in the fence between the two properties in question and since that time he has used it for the purposes of access to a lane at the rear of his premises and those of the respondent. The respondent did not object to this. Shortly before action was brought the appellant tore down this fence and erected a new fence on the line separating lots 9 and 10, throughout its entire length. This fence cuts off the respondent's access to the rear portion of his premises, and largely excludes him from using the walk."

On 26th October 1938 the parties entered into a written agreement in which, after recitals as to the ownership of the respective lots, the plaintiff, as party of the first part, granted permission to the defendant, party of the second part, "to connect the sewer of the party of the second part to the drain or sewer of the party of the first part, at a point about three feet west of the easterly face of the brick building of the party of the first part, said connection to be made at the expense of the party of the second part." The defendant undertook to make the connection "as expeditiously and efficiently as possible, and as soon as the said connection shall have been made to fill any excavations and restore the ground and sidewalk to its

original condition." The defendant also agreed that if the plaintiff's sewer or drain became blocked, the defendant would pay fifty per cent. of the cost of cleaning it out or repairing it. It was further provided that the plaintiff should have the right to cancel the privilege granted by the agreement, and that in the event of such cancellation he would "disconnect the sewer from the sewer of the party of the first part, such disconnection to be made in as expeditious and efficient manner as possible, and with as little inconvenience as possible to the lands of the party of the first part and/or the occupants thereof, and to be followed by the replacement of the dirt and the restoration of the cement sidewalk to its original condition."

Urquhart J. found that the defendant's title to the portion of land at the rear of the premises, between the lot line and the site of the old fence, had been extinguished, and that the plaintiff had become entitled to a right of way by prescription over the portion of the defendant's property covered by the cement walk. The formal judgment contained a declaration as to the extinction of the defendant's title at the rear, an order for the recovery of that land by the plaintiff, and an order for the removal of the wire fence and the restoration of the old board fence. It further contained, in para. 5, a declaration that, except as set out in the agreement of 26th October 1938, "the defendant is not entitled to maintain the connection to the sewer made in pursuance to the said agreement, which sewer at the present time services both properties and lies between the two buildings." The plaintiff was also awarded \$150 damages for trespass.

10th September 1943. The appeal was heard by HENDERSON, GILLANDERS and KELLOCK JJ.A.

I. Levinter, K.C., for the defendant, appellant: To establish a possessory title to the rear portion, the respondent must prove actual exclusion of the true owner from the property, and the respondent's actual, constant and visible possession. This constant possession must be strictly proved, and in the case at bar there is no suggestion that the true owner was ever excluded. Even if we consider the period the respondent was there, user within the meaning of the cases cannot be shown for that time, nor is there satisfactory evidence of possession: *Carson v. Musialo*, [1940] O.W.N. 398, [1940] 4 D.L.R. 651. Unless the respondent actually proves user, the true owner is deemed to

be in possession: *Mechanic et al. v. Karnov*, [1943] O.W.N. 164, [1943] 2 D.L.R. 201. The respondent lived in Detroit and tenants occupied the property from 1924 to 1932. There is no proof that they had user of the strip during that period. The only evidence on the point is a general statement by the respondent, and it was impossible for him to know.

With respect to the front strip, the trial judge has held that the respondent is entitled to an easement in respect thereof. In order to claim an easement, it must be properly and specifically pleaded: Gale on Easements, 11th ed., p. 235. The Limitations Act, R.S.O. 1937, c. 118, ss. 34, 35, dealing with easements, was not pleaded. Inasmuch as the respondent thought he had in his deed this piece of land, it was not present in his mind that he was exercising a right of user and his use cannot establish an easement: *Attorney-General v. Horner* (No. 2), [1913] 2 Ch. D. 140 at 179.

B. D. Caplan, K.C., for the plaintiff, respondent: The respondent and his predecessors in title for nearly thirty years had open, peaceful, quiet, undisputed and uninterrupted possession of the lands lying between the fence and lot 9, and the fence between the two properties was for nearly thirty years recognized as the boundary line between the lands of the respondent and of the appellant. This strip of land is valueless to the appellant but important to the respondent. [GILLANDERS J.A.: Is there any more specific evidence of user than that to which reference has already been made?] The evidence is general, but in any event there is no need of user in order to establish the respondent's rights. The fence was treated by the tenants and predecessors of the respondent as the boundary line. The important point is that these people all recognized the fence as the boundary line and treated it as such, and this factor should be the governing one in the present case: *Nourse v. Clark*, [1936] O.W.N. 563. All we really ask is the removal of the new fence and the re-establishment of the old fence. The respondent has had the open, notorious, exclusive and adverse possession necessary to acquiring a title by possession: Armour on Real Property, 2nd ed., p. 475, *De Vault v. Robinson* (1920), 48 O.L.R. 34 at 40, 54 D.L.R. 591. This strip of property was occupied, used and enjoyed by the respondent and his tenants as fully as if they were the owners of it and to the exclusion of the true owner for a period of more than ten years before the respondent's

possession was disturbed: *Babbitt v. Clarke*, 57 O.L.R. 60, [1925] 3 D.L.R. 55. It has been suggested that in the preamble to the agreement signed by both parties in 1938, the respondent acknowledged the appellant to be the true owner of this strip, but by that time our title by possession was complete, and the property was vested in the respondent by possession and could not be taken from him: *McIntyre v. The Canada Company* (1871), 18 Gr. 367; *Gamble et al. v. Rees* (1850), 6 U.C.Q.B. 396; *Phillips v. Murray*, [1929] 3 D.L.R. 770, [1929] 2 W.W.R. 314. The appellant and his predecessors in title did not, within the period allowed by the Statute of Limitations, make a legal and effective re-entry upon the said lands, and the respondent's right to continue in possession has therefore not been defeated.

I. Levinter, K.C., in reply: The cases of *Babbitt v. Clarke*, 57 O.L.R. 60, [1925] 3 D.L.R. 55, and *Nourse v. Clark*, [1936] O.W.N. 563, are distinguishable upon the facts from the case at bar. User must be proved for ten years by actual possession.

Cur. adv. vult.

27th October 1943. HENDERSON J.A. (*dissenting in part*) [after setting out the facts]:—It is not disputed that this board fence as originally erected and as altered as aforesaid was, when erected and when altered, on the defendant's property, but the plaintiff in this action claims title by possession of the strip of land, originally part of lot 10, which, by reason of the erection of the fence, was apparently enclosed with lot 9.

I am of opinion that the evidence fails to establish in the plaintiff, or his predecessors in title through whom he can claim, the possession necessary to bar the title of the true owner. It is said that such possession must be an actual, constant, visible occupation to the exclusion of the true owner for the full statutory period, and the necessity for proving exclusion of the true owner is emphasized in *Stevens v. Skidmore*, 66 O.L.R. 494, [1931] 2 D.L.R. 467, affirmed [1931] O.R. 649, [1931] 3 D.L.R. 455, and referred to in *Carson v. Musialo*, [1940] O.W.N. 398 at 400, [1940] 4 D.L.R. 651.

It may be said that here the only evidence of exclusion of the true owner is the building by him of the fence on his own land, and it is of some significance that he, of his own motion, and apparently without any objection, altered the location of the fence at one time and on another occasion opened the fence

by the construction of a gate. I find no evidence of acts of possession to prove ownership on the part of the plaintiff other than the fact that by the building of the fence the strip of land in question was enclosed with his back yard, but there is no evidence of cultivation of this piece of land or other acts to indicate ownership other than a general statement that the children played in this yard from time to time. I am therefore of opinion that the plaintiff fails as to this part of his case.

With reference to the strip of land lying under the concrete walk, very different considerations arise, and I am of opinion that there is evidence to support the finding of the learned trial judge that the plaintiff has proved title by prescription to an easement over this parcel of land for the purpose of access to his building.

The learned trial judge has found that while the acts of the defendant were high-handed and unwarranted, no pecuniary damage resulted to the plaintiff, yet he awards him \$150 damages, which, in my opinion, cannot be supported.

The appeal should be allowed as to the strip of land pencilled in red on the blue-print filed as Ex. 10; the appeal should be allowed as to the wire fence referred to in para. 2 of the formal judgment, with the exception that the defendant should be ordered to forthwith remove the wire fence so far as it interferes with access to the plaintiff's building and the judgment should declare that the plaintiff is entitled to an easement over the strip of land between the two properties to the easterly limit of the strip pencilled in red on the blue-print filed as Ex. 10; also para. 6 of the formal judgment should be struck out.

In view of the divided success and of all the circumstances, I think there should be no costs to either party, either of the action or of this appeal.

GILLANDERS J.A.:—I am in agreement with the reasons and conclusions of my brother Kellock.

On the argument of the appeal I entertained doubts whether the evidence established that the defendant's title to the strip of land lying to the north of the old fence had been extinguished.

There seems no doubt that until the defendant, in September 1942, took down the existing fence, it had since the year 1914 been recognized as the boundary and dividing line between the two properties. In *Ledyard v. Chase*, 57 O.L.R. 268 at 269, [1925] 3 D.L.R. 794, Riddell J. (as he then was) says:

"In the decision of this case I am content to accept the finding of the learned trial Judge as to this fence, in connection with the evidence upon which he placed reliance; it is not the enclosure but the occupation of the property which is the determining feature. In very many cases, amongst them *McIntyre v. Thompson* (1901), 1 O.L.R. 163, the occupation or possession which the statute requires in order to give a title adversely to the owner of the paper title has been discussed. *McConaghy et al. v. Denmark* (1880), 4 S.C.R. 609, in the Supreme Court of Canada, is a leading case, and there it is laid down as undoubted law that possession necessary to bar the title of the true owner must be an actual, constant, visible occupation, by some person or persons, to the exclusion of the true owner, for the full statutory period. *Sherren, Jr. v. Pearson* (1887), 14 S.C.R. 581, lays down the principle again, and adds that this possession must not be equivocal, occasional, or for a special or temporary purpose." And later, at p. 270:

"The existence of a fence is not occupation at all—it is indeed evidence that such occupation as exists is exclusive, in that a fence is often intended to exclude from the fenced property; but, while it is evidence, it is not conclusive."

In *Kirby v. Cowderoy*, [1912] A.C. 599, at 603, 5 D.L.R. 675, 2 W.W.R. 723, the following is said (by Lord Shaw of Dunfermline):

"On the general subject of possession, the language of Lord O'Hagan in *The Lord Advocate v. Lord Lovat* (1880), 5 App. Cas. 273 at 288—language cited with approval by Lord Macnaghten in *Johnston et al. v. O'Neill et al.*, [1911] A.C. 552 at 583—appears to be applicable to the present case. Possession 'must be considered in every case with reference to the peculiar circumstances. . . . The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests—all these things, greatly varying as they must, under various conditions, are to be taken into account in determining the sufficiency of a possession.'"

While the existence of the fence is not conclusive evidence of possession in the circumstances here present it is cogent evidence. Standing as it did between two small city lots, it is of more significance here than it might be in the circumstances of *Ledyard v. Chase*, *supra*, where the property in question con-

sisted of marsh lands. In addition to this there is relevant evidence, apparently accepted by the trial judge, referring to the property lying to the north of this fence. It is in evidence that in the period from 1914, when the fence was erected, to 1934, the occupants of the adjoining property "had children who used to play in that yard and used to use the whole of that"; that the adjoining owner "used it all the time", and that the defendant's predecessors in title never disputed the right of the adjoining owner to use the lands to the north of this fence.

I appreciate that the evidence of user and occupation is sketchy. It must, however, be viewed in the light of the circumstances of this case. The land in question is part of a small city residential lot. The board fence was treated as the boundary line by all parties for much longer than the necessary statutory period, and the defendant and his predecessors in title back to 1914 never disputed the right of the plaintiff, and his predecessors in title, to use the land beyond the fence. In the light of these circumstances, the evidence, I think, is sufficient.

KELLOCK J.A. [after setting out the facts as above]:—By the judgment in appeal the appellant's title to the strip of land lying between the lot line separating lots 9 and 10, on the north, and the site of the fence which the appellant destroyed, on the south, has been declared to be extinguished, and the respondent has been declared entitled to an easement over the concrete walk for ingress to and egress from his premises. It will be convenient to refer to the lands over which the respondent has been declared entitled to an easement as the "front portion", and the strip in which the appellant's title has been declared extinguished, as the "rear portion".

It is argued on behalf of the appellant, with regard to the rear portion, that the evidence is insufficient to establish the kind of possession necessary to extinguish the appellant's title, and that in any event an undated agreement between the parties, made some time in the year 1938, is a sufficient acknowledgment to prevent the loss of the appellant's right in this strip.

In my opinion, having regard to the nature of the property, namely a back yard or lawn in a city, the evidence should be regarded as sufficient. I refer to *Babbitt v. Clarke*, 57 O.L.R. 60 at 63, [1925] 3 D.L.R. 55, affirmed, [1927] S.C.R. 148, [1927] 2 D.L.R. 7; *Norton v. London* (1879), 13 Ch. D. 268; *Marshall v.*

Taylor, [1895] 1 Ch. 641; *Preston and Newsom, Limitation of Actions*, p. 136. However, I am of the opinion that the evidence does not establish possession of that part of the rear strip lying to the east of the easterly terminus of the old fence, namely, the north-west corner of the plaintiff's building. The evidence was entirely limited to that portion of the strip lying to the north of the fence and garage, and was not directed to any part of the lands between the northerly walls of the appellant's residence and the lot line. I think, therefore, the judgment below should be amended accordingly.

With regard to the appellant's contention, based upon the agreement of 1938, I think it sufficient to say that the appellant's title to the strip had been extinguished long prior to that date, and the acknowledgment, if it be such, was ineffective: *Sanders v. Sanders* (1881), 19 Ch. 373.

With respect to the front portion, the appellant complains that an easement was not asked for in the pleadings, and that he has been taken by surprise. However, when one examines the statement of claim, it clearly alleges the facts both as to the possession of the rear strip and the use of the walk, as well as the interference of the appellant with both, and claims, among other things, a mandatory order directing the removal of the new fence erected by the appellant. In my opinion this was a sufficient pleading without the necessity for using the word "easement". In any event, as it does not appear, and is not suggested, that any evidence available to the appellant was not adduced, I would, even at this stage, grant leave to the respondent to amend.

It is next contended on behalf of the appellant that the respondent did not show that he had used the easement for a period of twenty years next before the commencement of the action. I have read the evidence to which our attention has been called, but, in my opinion, the evidence adduced on the part of the respondent did show the required user.

The appellant further argues that the use of the front strip on the part of the respondent was due to a misapprehension or mistake on his part, that the land over which the walk ran was within the limits of lot 9, and, therefore, his property, and that accordingly there was no enjoyment as of right. The consequence, according to the argument, is that however long the user may have been, no easement resulted. This point was not raised

below. Mr. Levinter in support of his argument referred us to *Chamber Colliery Company v. Hopwood* (1886), 32 Ch. D. 549 and *Attorney-General v. Horner* (No. 2), [1913] 2 Ch. 140.

In the former case, the plaintiffs, lessees from the defendants of certain coal and working rights with respect thereto, made a drain on the premises, by which they led a stream to adjacent premises of which they later became owners. This drain was stopped by the defendants on the expiration of the lease. The plaintiffs claimed a right to its continuance by prescription. The drain had been made without the permission of the defendants, but with the knowledge of their agent, who encouraged the work. The plaintiffs failed in their action on the ground that if the making of the drain was not authorized by the lease (as to which the Court gave no opinion), it was made and enjoyed, either under the belief of both parties that it was authorized by the lease, or under a friendly comity between landlord and tenant, and that there was no enjoyment as of right so as to give the tenant a right to water after the lease had expired. Cotton L.J., at p. 557, says that what was done by the lessees "cannot prevent the owner of the *Chamber Hall* estate from insisting, at the end of the lease granted by him, that what they did was under an assumption that the lease granted them a right, and under an acquiescence by him in that assumption, or prevent him at the end of the lease from putting an end to the right which was only in the consideration of both parties an incident to the position of the lessors and lessees." This passage sufficiently sets forth the basis of the decision.

In *Horner's* case the defendant, who had claimed to use certain streets for market purposes on certain days under a franchise which did not in fact include such rights, was held not entitled to base his claim either upon the theory of a dedication of the streets subject to a reservation of the rights in favour of the market owner or upon easement. With the first the case at bar can have nothing in common. With respect to the alleged easement it was held that such an easement would be a novelty. Buckley L.J., at p. 179, after referring to the user in fact of the defendant says: "It has been found as a fact that the defendant claimed to be entitled to do what he did by virtue of his franchise. The claim which he was preferring as of right, therefore, was a claim based upon a right which did not exist. . . . If his enjoyment originated in mistake and he asserted his

right to be grounded, say, on an award which did not support it, then however adversely the right may have been exercised, it cannot for purposes of presumption be referred to any other ground than what he himself insisted on at the time: *Campbell v. Wilson* (1803), 3 East 294, 102 E.R. 610." Where, however, there is merely user, without any assertion of the basis of the claim, the case, in my opinion, is not brought within this principle. In the case at bar, although the respondent says he thought that the walk was within the confines of lot 9, there was no assertion by him of any claim in any way apart from the laying of the walk and its user for more than twenty years. Where the user relied on has been in exercise of a right asserted which turns out to be one which does not in fact exist, there would appear to be reason for not allowing such a user to be relied on for the purpose of establishing some other right. As put by Kelly C.B. in *Lord Rivers v. Adams* (1878), 3 Ex. D. 361, at 372: "It is plain that if we refer the user to any other right than the one in respect of which it was actually exercised, we might be doing the greatest injustice. For the lord might allow the inhabitants of cottages to exercise the right as inhabitants, knowing that it was a right which could not be established in point of law, and which there was no necessity to interrupt; and he might afterwards be bound by his own interruption, because another right was acquired."

In *Campbell v. Wilson* (1803), 3 East 294, 102 E.R. 610, the defendant was entitled to a right of way under an award. In fact he used a different way. It was held that he had acquired an easement by user in respect of the way actually used. Lord Ellenborough C.J., at p. 300, says: "Now though by possibility the parties might in fact have acted on a mistake of the award, yet on the evidence given nothing appears to shew that they referred their acts to the award. . . . On looking into the award we might possibly suppose that the use of the way originated by mistake, but no evidence was given of any fact accompanying the enjoyment to shew that the parties acted upon such a mistake." Lawrence J. at p. 302 says: "For if in exercising the right of way from time to time it had appeared that the party had asserted his right to be grounded on the award, though it were exercised ever so adversely, I do not know how the jury would be warranted in referring it to any

other ground than what the party himself insisted on at the time."

In *Earl De la Warr v. Miles* (1880-1), 17 Ch. D. 535, action was brought to restrain the defendant from carrying away from a forest certain brakes, fern and litter. The defendant based his claim as a commoner entitled under a decree made in 1693 and also by prescription. He failed on the first ground but succeeded on the second. In his judgment, James L.J. says, at p. 584:

"In my opinion the Defendant Mr. *Hale* has proved that for a period of upwards of sixty years he has claimed to take, and has taken, not by way of permission, not by way of concession on the part of the lord, but has taken as of right—that is to say, as a thing which he was entitled to do under some right or other—the litter from the forest to his farm for the use of that farm for the agricultural purposes for which litter would be used on that farm. That is what he has set up by the 15th paragraph of his defence, and it appears to me that he has succeeded in proving distinctly that he has done so.

"Now, is that within the *Prescription Act*? It appears to me that if we were to hold that it was not, we should be repealing the Act. What the Act was intended to legalize was a thing which had been done, as of right, for a sufficient period. It has been contended on behalf of the Plaintiff that not only must it be shewn to have been done as of right, but it must be shewn to have been done under a claim of some right capable of being supported as valid by prescription, or grant, or custom; and that if the thing was done under a claim to a right which could under no circumstances be a valid legal right, the thing would not be legalized by the *Prescription Act*.

"In my opinion that contention cannot be supported. It does not signify, as it seems to me, what was the nature of the claim made, provided the thing actually done was a thing a right to do which could have been legally granted to the man who was doing it, so that a right to do it could have had a legal origin." Brett L.J., at p. 593 says:

"Now, first of all, I do not think that he did make the claim in that form. But, secondly, it seems clear to me upon the construction of the statute, that if he had done so it would have made no difference. His claiming to exercise the right, which he did in fact exercise, in respect of some alleged title, which

could not be supported, is, in my opinion, wholly immaterial, because, as I have said, the only question is, when the fact of enjoyment has been proved, whether a right to do the acts complained of was capable of being supported by prescription, or a custom, or a grant, if such had been proved. Therefore, that objection seems to me to fail . . . the assuming to take it under an erroneous view, or in respect of an erroneous claim, seems to me immaterial." And lower down on p. 594:

"It was then said that the litter was taken because the Defendant and his predecessors were of opinion that they had a right to do so under the words of the decree, and that that view was erroneous. For the same reason, if they so claimed it, and perhaps they did, that seems to me to be immaterial. Therefore I think that the user has been established, and I think it is clear that the Defendant and his predecessors, whatever view they took of their rights, at all events assumed to take litter as a matter of right whether the lord permitted them or not, and in my opinion the view they took of their right is not material." Cotton L.J., at p. 597, says:

"It is said, however, that nearly all the persons who cut litter did it, not in respect of their own particular farms, but under a general supposition that the decree gave them a right to do so, or that there was some custom which justified it. In my opinion, as I have already said, it is not necessary under the statute that the acts done would at the time have been attempted to have been justified in a way in which we think they can legally be justified, if the person doing them was claiming to do them as of right. What particular right the persons doing the acts alleged, unless there was permission from time to time given by the lord, in my opinion is not material under the statute."

It is true that the user which was in fact established in the above case was a user for sixty years which would come under the last part of 2 and 3 Wm. IV, c. 71, s. 1, which corresponds to s. 33 of R.S.O. 1937, c. 118, but the judgments do not appear to distinguish between the earlier and latter parts of the section.

In *Attorney-General of Southern Nigeria v. John Holt and Company (Liverpool) Limited et al.*, [1915] A.C. 599, the respondents were grantees from the Crown of certain lands in the island of Lagos bordered by the sea. They had reclaimed and for many years had used parts of the foreshore which belonged

to the Crown, for the purposes of their business as merchants, and had erected buildings thereon. With respect to a claim of easement over a portion of the reclaimed lands, the Attorney-General, in opposing it, based his appeal, which was successful, on the ground that the respondents, having been in exclusive possession of the servient tenement, could not therefore acquire an easement over it by prescription.

In the judgment, delivered by Lord Shaw of Dunfermline, at p. 617, his Lordship says:

“It seems to be undoubtedly true that what was done by the respondents was done by them as in their opinion upon their own lands. There was much in the nature of affairs and the legal situation to induce this opinion, and it is not to be wondered at that not only they, but all parties on the island, appear to have considered these operations, which were clearly beneficial to the general interest, in no way to be of the nature of wilful appropriation or of trespass, but merely of making good and proper use of their rights as owners of property abutting upon the sea. An easement, however, is constituted over a servient tenement in favour of a dominant tenement. In substance the owner of the dominant tenement throughout admits that the property is in another, and that the right being built up or asserted is the right over the property of that other. In the present case this was not so.”

At first sight this language would appear to support the position of the appellant here. But the facts with which the judgment deals consisted of a course of conduct on the part of the appellants which amounted to use of the land to the full extent as owners. As put in argument at p. 617: “The possession founded upon was possession of the land as owner thereof.” In the case at bar the respondent did not have exclusive possession of the land covered by the walk. The evidence shows that the appellant used it whenever required to paint his own house and to put up and take down storm windows. He says he used the front strip between the two houses for the above purposes whenever he required to do so without any thought of asking the respondent’s permission and that he thought when he purchased his property that he had rights in this strip. His evidence is quite consistent with the view that while he owned the land covered by the walk, the respondent was entitled to maintain the walk and the sewer beneath. I take what was

decided in *Holt's* case to be that where the acts upon which the claim to an easement is based are attributable to a claim to ownership of the soil itself, such acts cannot be relied upon to establish a claim to a mere fragment of that right, such as an easement, which was never exercised apart from the claim to ownership of the soil itself. That is the principle of the decision in *Lyell v. Lord Hothfield et al.*, [1914] 3 K.B. 911, and, if that be the true principle, these two last mentioned cases do not apply to the case at bar. The cases which I have discussed above, other than *De la Warr's* case, do not, in my opinion, decide that in such circumstances as exist in the case at bar, an easement cannot be supported.

My view accordingly is that the judgment below is right in holding that the respondent did establish a claim to an easement in respect of the walk, and I think this view is supported by the judgments in *De la Warr's* case. In my opinion the enjoyment of the walk by the respondent and his predecessor in title satisfies the requirements of an enjoyment as of right within the meaning of s. 34 of The Limitations Act, R.S.O. 1937, c. 118. I refer to *Hollins v. Verney* (1884), 13 Q.B.D. 304 at 315; *Union Lighterage Company v. London Graving Dock Company*, [1902] 2 Ch. 557 at 570-1.

I have not overlooked the decision in *Adams v. Fairweather* (1906), 13 O.L.R. 490, where the plaintiff had been accustomed to drive over a strip of the defendant's lands bordering a lane, in the belief that it formed part of the lane, but acquired no easement in the strip as his user had been in the exercise of a supposed right as one of the public. In affirming the decision below, Magee J. (as he then was) cites, with evident approval, *Earl De la Warr v. Miles*, *supra*, including the sentence from the judgment of Brett L.J., at p. 594, already quoted: "But if all that was taken was taken for the use of the farm, then the assuming to take it under an erroneous view, or in respect of an erroneous claim, seems to me immaterial." It seems to me accordingly that it is from the nature of the acts of user that a claim to an easement must be supported. In the *Adams* case the owner of the strip in question would not expect that any member of the public using it would acquire any rights in the strip, even though it turned out that one of them was a neighbouring landowner to whose land an easement in respect of the way could be appurtenant. At

p. 500 of the judgment, the following appears: "Here the plaintiff . . . was . . . exercising . . . only a supposed right as one of the public—a *claim which the defendant was not called upon to meet.*" (The italics are mine.) See also *Baldwin v. O'Brien* (1917), 40 O.L.R. 24 at 57-8 and 71.

I do not think the agreement of 1938 affects the result at which I have arrived. In view of the evidence already referred to, there was no mutual mistake which governed the conduct of the parties. All that the agreement has to say on the matter is its recital that the appellant and respondent are respectively the owners of lots 10 and 9. The instrument is silent as to any easement to which either lot may be subject.

The only remaining matter to be dealt with is the appellant's objection to para. 5 of the formal judgment. I think this objection is based on a misapprehension of the learned judge's reasons for judgment which clearly provide for what is expressed by the paragraph in question. The question of damages was not argued on the appeal, and I do not deal with it.

I would dismiss the appeal, with the variation previously mentioned, with costs.

Appeal dismissed with costs, subject to a variation,

HENDERSON J.A. *dissenting in part.*

Solicitor for the plaintiff, respondent: Bernard D. Caplan, Windsor.

Solicitor for the defendant, appellant: A. F. Gignac, Windsor.

[COURT OF APPEAL.]

Re Hull Estate.

Wills—Dependants' Relief—Conditions Precedent to Jurisdiction—Necessity for Showing that No Adequate Provision Made—Time for Applying—Discretion of Judge—The Dependants' Relief Act, R.S.O. 1937, c. 214, ss. 2, 4, 10.

On an application, under s. 2 of The Dependants' Relief Act, R.S.O. 1937, c. 214, for relief, it is an essential condition of jurisdiction that it should be made to appear that the testator has "so disposed of real or personal property that adequate provision has not been made for the future maintenance of his dependants or any of them". Only if this is shown has the judge authority to make any order; if it does not appear he lacks jurisdiction, and no order can be made under the Act. *Bosch et al. v. Perpetual Trustee Company, Limited, et al.*, [1938] A.C. 463, and other authorities, applied. In this connection, the circumstances to be considered are those existing at the date of the will, rather than the needs of the applicant at the time of the application.

A judge has complete discretion as to the time at which he will permit an application for relief to be made, after the lapse of the three months provided for in the Act, and so long as assets remain undistributed. The Court of Appeal will not interfere with his exercise of this discretion unless it is made to appear that an injustice will be done by permitting the order to stand. *Martin v. Deutch et al.*, [1943] O.R. 683, applied.

The Act expressly provides that proceedings shall be launched by originating notice. Every interested party is entitled to notice, and to be heard, before a judge makes an order extending the time for applying. In no circumstances should such an extension be allowed *ex parte*, nor is there any provision in the Act for the issue, *ex parte*, of an appointment fixing a day on which the judge will hear the application.

AN appeal from an order of Barton Sur. Ct. J., of the Surrogate Court of the County of York, on an application under The Dependants' Relief Act. The facts are fully stated in the reasons for judgment.

15th October 1943. The appeal was heard by RIDDELL, HENDERSON and LAIDLAW JJ.A.

G. M. Huycke, K.C., for the adult beneficiaries other than the widow, appellants: The application was made too late—eight years after the death of the testator. The trial judge was of opinion that he had discretion to permit an application at any time, even after the lapse of the period contemplated by the statute. He relied upon *Blackburn v. Mapp et al.*, [1917] N.Z. L.R. 565, but the statute under which that case was decided is quite different, and the application there was made immediately. [RIDDELL J.A.: Does not our Act give a discretionary power to the judge?] [HENDERSON J.A.: The Act says that the application may be made at any time, so long as part of the estate remains unadministered.] The estate here had been fully ad-

ministered by payment of debts, legacies and succession duties, and the assets were in the hands of the trustee and subject to the trusts of the will. S. 4(1) of the Act shows that it is contemplated that the application will be made in the year following the death. Under the interpretation section, "executor" includes an administrator with will annexed, but does not include a trustee. Once the executor's duties *qua* executor have been performed, and he has become a trustee, the estate is fully administered: The Devolution of Estates Act, R.S.O. 1937, c. 163.

The widow accepted benefits under the will for eight years, and all persons concerned believed that she considered the provisions made for her to be adequate. She is now estopped from contending the contrary: *Robertson v. Junkin* (1896), 26 S.C.R. 192 at 195.

The judge has no power under the Act to make an *ex parte* order extending the time for applying for relief; s. 4(1) clearly provides that the application shall be made on originating notice. The Act must be strictly construed.

Before the judge has power to grant any relief, he must first decide that adequate provision was not made in the will: *Walker v. McDermott*, [1931] S.C.R. 94, [1931] 1 D.L.R. 662. The onus is upon the applicant to show this. Here the testator did make adequate provision, and if the applicant is now without funds, she is the author of her own misfortune. I refer, as to adequacy, to *Re Cunningham (Deceased)*, *Cunningham v. Cunningham*, [1936] N.Z.L.R. s. 69, and *Re Pugh (Deceased)*; *Pugh v. Pugh* (1943), 59 T.L.R. 430 at 432.

The order made by the trial judge will give the applicant more, when added to what she received under the will, than she would have received upon an intestacy.

J. M. Baird, K.C., Deputy Official Guardian, for an infant, and *G. H. Gilday, K.C.*, for the executor and trustee, submitted their respective rights to the Court.

W. S. Montgomery, K.C., for the widow, respondent: The judge below had a discretion, and he properly exercised it. He considered everything required. The trust company named in the will as executor and trustee is still acting primarily as executor, and if there are certain trust powers under the will, those powers are merely supplementary to its powers as executor. The original assets have not been realized. The onus of showing

that the provision was inadequate has been satisfied, and the learned judge so found.

G. M. Huycke, K.C., in reply: Under s. 12 of the Act, this Court has a discretion equal to that of the trial judge. It is essential that the matter should be disposed of according to the circumstances at the time of the testator's death: *Re McCaffery*, [1931] O.R. 512 at 518, [1931] 4 D.L.R. 930.

Cur. adv. vult.

4th November 1943. The judgment of the Court was delivered by

LAILAW J.A.:—This is an appeal by the adult beneficiaries, other than Florence Sarah Hull, widow of the deceased, under the last will and testament of Richard William Hull, from an order made by His Honour Judge Barton, Surrogate Judge of the County of York, on the 13th March 1943, whereby, *inter alia*, it was ordered "that in addition to the benefits to which the said Florence Sarah Hull is entitled under the testator's will, the executors shall also pay to her from and out of the income of his estate during her widowhood, the sum of \$40.00 per month, commencing April 1st, 1943".

The last will and testament of the late Richard William Hull is dated 28th July 1931, and a codicil thereto is dated 3rd March 1934. The testator died on or about 10th December 1934, and administration of the property of the deceased was granted to the executor named in the will on 4th February 1935.

The beneficiaries under the will are the widow, Florence S. Hull, three children of the testator by his first wife, and eleven grandchildren.

The estate was valued for purposes of probate at slightly more than \$83,000. The value of the property available for distribution was approximately \$76,600.

Prior to his death the testator gave his wife a mortgage for \$5,000, which amount has since been paid to her. He also gave her a cheque for \$2,600, and the proceeds of it were received by her. Under the will the widow was given the use of the house and property where the testator resided at the time of his death, together with the use of his household goods and furniture, for her life and during widowhood; the testator directed payment of the sum of \$5,000 secured by the mortgage given

to her during his lifetime; and further bequeathed to his executor and trustee, upon trust for her, four out of eighteen shares of the residue of his estate. By codicil to his will, the testator also gave his automobile and accessories to his widow. The value of the widow's interest under the will and codicil is submitted by counsel for the appellants, as follows:—

Present value of life interest in house, etc.....	\$ 5,493.00
Mortgage principal	5,000.00
Present value of her share of residue of the estate...	12,262.00
Automobile	900.00
Total	\$23,655.00

If there be added the sum of \$2,600 received by the widow shortly before the testator's death, the total amount is computed at \$26,255. He says that the present value of the sum of \$40 directed to be paid monthly to the widow is \$6,500, and consequently, if the order is not reversed, the widow obtains benefits to the aggregate value of \$32,755 (approximately).

The appeal is brought to this Court on the following grounds:

(1) Application for relief cannot properly be made under the provisions of The Dependants' Relief Act, R.S.O. 1937, c. 214, because of lapse of time since the testator's death.

(2) The applicant, having accepted benefits under the will of the deceased, is now precluded from receiving additional benefits under the said Act.

(3) There was no jurisdiction to make the order in appeal, because the testator made adequate provision by his will for the future maintenance of his wife.

(4) The additional benefits to the widow under the said order are excessive, having regard to the limit of amount or value of allowance as provided in s. 10 of the Act.

On 9th January 1943, an order was made in chambers by His Honour Judge Barton on the *ex parte* application of Florence Sarah Hull, the widow of the deceased, extending until 11th January 1943 the time "for the applicant making an application under section 2 of The Dependants' Relief Act, for the relief mentioned in the said Section". On 11th January 1943, upon a further *ex parte* application by the said widow, the learned judge appointed the 22nd February 1943 to hear her application for relief under the Act, and directions were given for service of

notice on all interested parties. Objection is properly made by counsel for the appellant to the procedure taken on behalf of the applicant. It is expressly provided by s. 4 of the Act that "The application shall be made to the judge in chambers upon originating notice according to the practice of the court." Except in certain cases "the application shall be made within three months after the death of the testator, but the judge, if he deems it just, may allow an application to be made at any time as to any portion of the estate remaining undistributed at the date of the application." An application to a judge under this section, to extend the time as therein provided, ought not to be made *ex parte*, and there is no procedure for the issue of an appointment by him. All interested parties are entitled to notice, so that they may be present and be heard before a judge makes an order to extend the time. The statute describes the procedure to be followed, and no alternative is available. The course taken is disapproved, and might, in some circumstances, result in prejudice and injustice to interested parties. In this instance, however, all interested parties are now before the Court, and the questions involved in the matter ought to be determined.

It is urged that the application for relief is made at too late a time, *i.e.*, more than eight years after the death of the testator; also that at the time of the application, the estate was in the hands of the trustee named in the will and subject to the trusts thereof. It is quite clear that the provisions of the statute can operate only on "any portion of the estate remaining undistributed at the date of the application." No portion which has been distributed to beneficiaries or placed in trust out of the control of the executor is affected in any way. But, at the date of the application, there were assets of the estate which were properly available to satisfy an order of the Court under the provisions of the Act. It was, therefore, a matter for the learned trial judge, in the exercise of his judicial discretion, to permit an application to be made at any time he deemed just. Unless it be made clear to this Court by the appellants that an injustice would be done by permitting such an order to stand, the Court will not, and should not, interfere with it: *Martin v. Deutch et al.*, [1943] O.R. 683. No such injustice has been shown.

Counsel for the appellants argues that the applicant cannot accept benefits under the will of the deceased, and at the same

time seek to obtain additional benefits under the Act. I do not agree. The applicant can take under the will whatever rights and benefits are therein given to her. If they are inadequate for her future maintenance, she can apply to the Court for an order to add to them, and the whole, or a portion, of the estate may be charged with payment of an allowance to her. She is not prejudiced in any manner in such an application by the fact that she was given, and accepted, other benefits under the will.

The question of most importance in this case, and to be now determined, is whether the learned trial judge had any authority under The Dependants' Relief Act to make the order in appeal. The circumstances in which a judge may make an order are stated in the Act. I quote s. 2 in part as follows:—

“2—(1) Where it is made to appear to a judge of the surrogate court of the county or district in which a testator was domiciled at the time of death that such testator has by will so disposed of real or personal property that adequate provision has not been made for the future maintenance of his dependants or any of them, the judge may make an order charging the whole or any portion of the estate in such proportion and in such manner as to him may seem proper, with payment of an allowance sufficient to provide such maintenance.”

In *Walker v. McDermott*, [1931] S.C.R. 94, [1931] 1 D.L.R. 662, Duff J., discussing enactments of the Testator's Family Maintenance Act of British Columbia (R.S.B.C. 1924, c. 256) says at p. 96, “The conditions upon which this authority rests are that the person whose estate is in question has died leaving a will, and has not made, by that will, in the opinion of the judge, adequate provision for the ‘proper maintenance and support’ of the wife, husband or children, as the case may be, on whose behalf the application is made.”

In *Bosch et al. v. Perpetual Trustee Company, Limited, et al.*, [1938] A.C. 463, [1938] 2 All E.R. 14, [1938] 2 W.W.R. 320, Lord Romer, at p. 474 (A.C.), says, “. . . it is plain that the learned judge must have been satisfied that the widow had been left without adequate provision for her proper maintenance. Otherwise he would have had no jurisdiction to make the order.” At p. 476 he continues, “. . . the powers given to the Court only arise when any of the persons mentioned is left without adequate provision for his or her proper maintenance”. At p. 478, Lord Romer quotes, with approval, from the case of *In re*

Allardice, Allardice v. Allardice (1910), 29 N.Z.L.R. 959, and the judgment of Edwards J. at p. 972, as follows:—

“It is the duty of the Court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children, as the case may be. If the Court finds that the testator has been plainly guilty of a breach of such moral duty, then it is the duty of the Court to make such an order as appears to be sufficient, but no more than sufficient, to repair it.”

Also, at p. 479, he quotes Salmond J. in *In re Allen (Deceased)*, *Allen v. Manchester*, [1922] N.Z.L.R. 218 at 220:—

“The Act is . . . designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances.”

Finally, Lord Romer says at pp. 478-9, “ . . . in every case the Court must place itself in the position of the testator and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish, husband or father.”

In *In re Pugh (Deceased)*; *Pugh v. Pugh* (1943), 59 T.L.R. 430, Morton J. at p. 432, says, “Had I been sitting in the testator’s armchair I should have made slightly more provision for his widow than the testator in fact made, but I cannot arrive at the conclusion that the will did not make reasonable provision for her maintenance”. He refers to his judgment in *In re Styler; Styler v. Griffith*, [1942] Ch. 387 at 389, and says, “the Act only gives the Court the right to interfere if it comes to the conclusion that the dispositions which were made were unwarranted . . . I think that the Court has to find that it was unreasonable on the part of the testator to make no provision for the person in

question or that it was unreasonable not to make a larger provision."

The Court must judge the act of the testator at the time he made his will. Does it appear that he has so disposed of his property "that adequate provision has not been made for the future maintenance" of his widow? The question is not how much he ought to have provided, but: Did he fail to make adequate provision? The onus is on the applicant to satisfy the Court that the disposition by the testator of his property was inadequate for her maintenance from and after his death. The common law right of a person to dispose of his property as he chooses cannot be interfered with under the Act, except in the case expressly stated. When the condition precedent to the exercise of the powers of the Court is shown to be fulfilled, a judge may make an appropriate order. If it does not appear that such condition is fulfilled, there is an absence of authority, and no order can be made under the Act.

If a judge proceeds on principle properly applicable to the facts of a case and makes a decision judicially, in the exercise of his discretion, this Court will not interfere. But, if it appears that a judge has misdirected himself, or that his decision is so clearly wrong as to amount to an injustice, the Court can and should review the facts upon which the judgment ought to be given.

In my opinion, the learned judge did not give proper consideration and effect to the facts existing at the date of the will. On the contrary, he was, perhaps, unduly influenced by the needs of the applicant more than eight years later. He says that, at the time of the application, "she finds herself unable to live on the amount she receives from the estate and what little she is able to earn by taking in boarders . . . it is very doubtful that she could find any agreeable form of employment." Those facts in a proper case are relevant to the amount which ought to be allowed to an applicant, but they do not relate to the condition upon which jurisdiction of a judge to make an order depends. The more pertinent facts are that out of an estate, available for distribution, valued at about \$76,600 (not including the mortgage of \$5,000), the applicant was given approximately \$23,655 (not taking the mortgage into account), and, in addition, \$2,600 was paid to her by the testator shortly before his death. If he had died intestate, she would have been

entitled to approximately \$25,533. There is only one finding a judge of the Surrogate Court can reasonably and properly make on the facts of this case, *viz.*, that the applicant has not made it appear that the testator has, by will, so disposed of real or personal property that adequate provision has not been made for her future maintenance. My view is, therefore, that the learned judge had no authority under the Act to make an order for payment of any amount.

It is unnecessary to determine whether the order is in violation of s. 10 of the Act, whereby a limit is prescribed to the amount or value of any allowance ordered to be paid. For reasons I have given the appeal should be allowed and the order of the learned judge set aside.

Notwithstanding failure of the respondent on this appeal, and failure to obtain an order as applied for in the Surrogate Court, I think it is a case in which costs should not be given to or against her.

The costs of the appellants, of the executor and of the Official Guardian in this Court on the scale of the Supreme Court, and also in the Surrogate Court at the amounts fixed by the learned judge, should be paid out of the estate of the deceased, the costs of the executor on this appeal to be on the scale of solicitor and client.

Appeal allowed and order set aside.

Solicitors for the appellants: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the executor and trustee: Duncan & Gilday, Toronto.

Solicitors for the widow, respondent: Malone, Malone & Montgomery, Toronto.

[PLAXTON J.]

Re Toronto Beaches Election; Ferguson v. Murphy.

Elections—Controverted Returns—Application for Recount—Position of County Court Judge—Formalities of Application—Security—Nature of Deposit Required—Insufficiency of Accepted Cheque—The Election Act, R.S.O. 1937, c. 8, s. 130(2).

Banks and Banking—Nature of Certified Cheque—Distinction between this and "Bank Bill"—Meaning of Latter Term—The Bank Acts, R.S.C. 1927, c. 12, ss. 72, 73; 1934 (Dom.), c. 24, ss. 72, 73—The Bank of Canada Act, 1934 (Dom.), c. 43—The Bills of Exchange Act, R.S.C. 1927, c. 16, ss. 127, 165(1).

The jurisdiction of a County Court judge, under s. 130 of The Election Act, R.S.O. 1937, c. 8, to hold a recount of votes, is wholly statutory, and depends upon strict compliance with the conditions prescribed by the section, including the deposit of security.

A cheque, even if it is marked "accepted" by the bank upon which it is drawn, is not within the words "the bills of any chartered bank doing business in Canada", in s. 130(2), and if such a cheque is deposited as security for costs, there is no jurisdiction in the judge to proceed with the recount. The words quoted must be taken to refer to "bank notes", which the banks are authorized by The Bank Act, 1934 (Dom.), c. 24, to issue as a form of currency, although not legal tender.

Quaere, whether a County Court judge, in dealing with an application for a recount, acts as a judge or as *persona designata*. *Re the Election for St. Patrick's Riding*, [1934] O.W.N. 492; *Re North Huron Election* (1925), 58 O.L.R. 197; *McLeod v. Noble et al.* (1897), 28 O.R. 528 at 539, referred to.

Quaere, whether there is any jurisdiction in the Supreme Court to grant a *mandamus* to a County Court judge in such matters, or whether, on the contrary, the matter is entirely within the jurisdiction of the Legislature. *In re Centre Wellington Election* (1879), 44 U.C.Q.B. 132; *McLeod v. Noble et al.*, *supra*; *McLeod v. Noble*, (1897), 24 O.A.R. 459, referred to.

Mandamus—When Granted—Not where Inferior Tribunal has Decided, on Evidence, that it Lacks Jurisdiction.

Mandamus will not be granted where an inferior tribunal, acting in a judicial capacity, has entered upon a hearing and has decided on evidence (even though the decision is wrong) that it lacks jurisdiction. *Mandamus* does not lie to compel such a tribunal, once it has heard and determined a matter within its jurisdiction, to reconsider or reverse its decision.

A MOTION for an order in the nature of prerogative *mandamus* and for other relief, fully set out in the reasons for judgment.

28th September 1943. The motion was heard by PLAXTON J. in chambers at Toronto.

F. A. Brewin, for Gordon Ferguson, applicant.

R. H. Greer, K.C., and *G. A. Martin*, for T. A. Murphy, respondent.

5th November 1943. PLAXTON J.:—On this motion the applicant asks for an order in lieu of a prerogative writ of *man-*

damus, directing His Honour Judge Denton, Junior Judge of the County Court of the County of York, to proceed with a recount of the votes cast at the Provincial election held on 4th August 1943, for the election of a member of the Legislative Assembly of Ontario, in the electoral district of Toronto Beaches, in accordance with the provisions of The Election Act, R.S.O. 1937, c. 8, and further, alternatively, for an order granting leave to appeal to the Court of Appeal from the decision of His Honour Judge Denton, refusing to proceed with the said recount, and dismissing the application for the same.

There is no dispute as to the relevant facts.

At the Provincial election held on 4th August 1943, for the election of a member of the Legislative Assembly of Ontario, in the electoral district of Toronto Beaches, Mr. T. A. Murphy, one of the candidates, was, on 11th August 1943, declared elected by the returning officer by a majority of 42 votes. On 14th August 1943, Mr. Gordon Ferguson, an unsuccessful candidate in the election for the said district, made application to His Honour Judge Denton, Junior Judge of the County of York, for a recount of the votes cast in the said election; and, upon the strength of allegations set forth in the affidavit of Sherman Taylor, official agent of Mr. Gordon Ferguson, was granted an appointment. The same day a marked cheque, drawn on an account in the Toronto branch of the Imperial Bank of Canada, a chartered bank doing business in the Dominion of Canada, payable to Ferguson's solicitor, John J. Sullivan, and endorsed in blank by him, and marked "accepted" by the bank, was deposited with a clerk in the office of the Clerk of the County Court of the County of York.

Application for a recount was made professedly in pursuance of the provisions of s. 130 of The Election Act. The relevant provisions of that section, subss. 1 and 2, provide as follows:

"130. (1) In this section and in sections 131 to 143 'judge' shall mean the judge of the county or district court and where there are two or more judges the senior judge, or a junior judge, in case of the illness or absence of the senior judge or where the senior judge requests him to act.

"(2) If within four days after that on which the returning officer has made addition of the votes for the purpose of declaring any candidate elected, upon the application of a candidate or a voter, it is made to appear by affidavit to the judge of the

county court of the county in which the electoral district or any part of it is situate that a deputy returning officer has in counting the votes,

“(a) improperly counted any ballot paper;

“(b) improperly rejected any ballot paper;

“(c) made an incorrect statement of the number of ballots cast for any candidate; or

“(d) that the returning officer has improperly added up the votes;

“and if the applicant deposits within that time with the clerk of the county court the sum of \$100 in legal tender, or in the bills of any chartered bank doing business in Canada, as security for the costs, in connection with the recount or final addition, of the candidate appearing by the addition to be elected, the judge may appoint a time and place to recount or finally add up the votes cast at the election.”

At the hearing of the application for recount, it was objected by counsel for Mr. T. A. Murphy that the said marked cheque deposited as security for costs was not such security as is required by subs. 2 of s. 130 of The Election Act, and that Denton Co. Ct. J. had, therefore, no jurisdiction to proceed with the recount.

Evidence was taken before Judge Denton, and the question whether the deposit of the marked cheque complied with the requirements of the statute was fully argued before him. Judgment was reserved. On 4th September 1943, his Honour delivered reasons for judgment, dismissing the application for a recount, on the ground that security for costs had not been deposited in accordance with the requirements of said s. 130(2), and revoking the appointment which he had given.

On behalf of the applicant, it was argued before Denton Co. Ct. J., and also before me on the present application, that the cheque in question, having been marked “accepted” by the Imperial Bank of Canada, came within the connotation of the words “bills of any chartered bank doing business in Canada,” that is to say, it was a bill of the Imperial Bank of Canada. His Honour Judge Denton rejected this contention and came to the conclusion that the word “bills” in s. 130(2) of The Election Act, refers only to bills commonly in circulation as paper currency.

The principles upon which I apprehend that I should proceed in disposing of the present application are these:—

1. Under the provisions of The Judges' Orders Enforcement Act, R.S.O. 1937, c. 123, if the judge of the County Court acts in the execution of the functions confided to him by s. 130 of The Election Act as *persona designata* and not judicially as judge of the County Court, then, no right of appeal from his order being otherwise provided, an appeal lies from such order to the Court of Appeal by leave of a judge of the Supreme Court. In *Re the Election for St. Patrick's Riding*, [1934] O.W.N. 492, Fisher J.A. held that a County Court judge acts judicially as judge of the County Court and not as *persona designata* in the exercise of the jurisdiction conferred on him by the said provisions of The Election Act. Mr. Brewin challenged the correctness of this decision, citing in support of his submission the decision in *Re North Huron Election*, 58 O.L.R. 197, [1926] 1 D.L.R. 590, where it was held that under s. 71 of The Dominion Elections Act, 1920 (Dom.), c. 46, a judge of the Supreme Court of Ontario acts as *persona designata*. He also cited the *obiter dictum* of Boyd C. to the same effect in *McLeod v. Noble et al.* (1897), 28 O.R. 528 at 539.

However, assuming (without deciding) that a County Court judge acts, in execution of the duties confided to him under s. 130 of The Election Act, as *persona designata* and not *qua* judge of the County Court, it would, I apprehend, be a sufficient ground for granting leave to appeal if I entertained doubts whether the decision of the County Court judge refusing to proceed with the recount was right.

2. The alternative application for a *mandamus* amounts in substance to an appeal on the merits against the learned judge's decision: see *In re Parsons and Toms*; *In re Voters' List of Goderich* (1875), 36 U.C.Q.B. 88 at 92. Therefore, assuming (without deciding) that the case is one in which it would be proper to grant a *mandamus*, I should not, I apprehend, be justified in doing so unless I not merely entertained doubts whether the decision below is right, but was convinced that it is wrong.

On the merits, I am satisfied that the decision of Denton Co. Ct. J. is right; and on this ground alone the application as to each of the forms of relief sought must be dismissed.

S. 130(2) of The Election Act provides for the deposit, within the period of delay therein specified, with the Clerk of

the County Court, of the sum of \$100 "in legal tender, or in the bills of any chartered bank doing business in Canada," as security for costs, in connection with the recount.

The jurisdiction conferred on the County Court judges in the matter of recounts is purely statutory. Courts have interpreted such enactments literally and with the utmost strictness. This was manifested in the case of *Owens v. Upham* (1909), 39 N.B.R. 198, 6 E.L.R. 554; see also *In re Carleton Election; Ex parte Smith* (1911), 10 E.L.R. 68 at 69, affirmed at p. 141. The provisions of the enactment are mandatory and not merely directory: *In re Sunbury and Queen's Election; Smith v. McLean* (1911), 10 E.L.R. 221 at 224; and they were so treated, in relation to the deposit of security for costs in "current money of Canada" under a corresponding enactment of the Legislature of Manitoba, by Taylor, C.J. in *Re St. Boniface Election* (1892), 8 Man. R. 474, and by the Court of Queen's Bench of Manitoba in *Re Cypress Election* (1892), 8 Man. R. 581.

A similar construction has been given corresponding to Imperial enactments: see *Williams v. The Mayor of Tenby et al.* (1879), 42 L.T. 187; and *Everett v. Griffiths (No. 2) et al.*, [1923] 1 K.B. 130.

It follows, therefore, that due compliance with the requirements of s. 130(2) of The Election Act in regard to the deposit of security within the period of delay and in the form prescribed by that enactment is a condition precedent to the jurisdiction of the County Court judge to enter upon a recount of the votes cast at the election in question, and not a mere matter of procedure, the non-compliance with which could be rectified by the Court.

The cheque deposited with the Clerk of the County Court, even though marked "accepted" by the bank, does not, in my opinion, fall within the connotation of the words "the bills of any chartered bank doing business in Canada".

I quite agree that ". . . the word *bill* is one of the most general that can be used, wherever it is not confined by other terms. [*E.g.*] A *bill* in parliament, a *bill* in chancery": *The Governor and Company of the Bank of England v. Anderson et al.* (1837), 3 Bing. (N.C.) 589 at 601, 132 E.R. 538, per Maule *arguendo*; but here, the word "bills" is qualified and restrained by the context in which it is found.

“A cheque is a bill of exchange drawn on a bank, payable on demand”: s. 165(1) of The Bills of Exchange Act, R.S.C. 1927, c. 16.

In *Ramchurn Mullick v. Luchmeechund Radakissen et al.*, (1854), 9 Moo. P.C. 46 at 69, 14 E.R. 215, Baron Parke said: “A cheque does not require acceptance; in the ordinary course it is never accepted; it is not intended for circulation, it is given for immediate payment.”

A cheque, like a bill, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof (s. 127 of the Bills of Exchange Act); the holder cannot sue the bank on the cheque: *Hopkinson v. Forster* (1874), 19 L.R. Eq. 74 at 76. *Boyd et al. v. Nasmith* (1888), 17 O.R. 40 at 45. But the bank may make itself liable on the cheque by certifying it or marking it “accepted”.

What is the effect of a cheque being certified or marked “accepted” by the bank on which it is drawn? It does not have the effect of making it current as cash: “A cheque certified before delivery is subject, as regards its subsequent negotiation, to all the rules applicable to uncertified cheques. The only effect of the certifying is to give the cheque additional currency by shewing on the face that it is drawn in good faith on funds sufficient to meet its payment, and by adding to the credit of the drawer that of the bank on which it is drawn”: *Gaden v. The Newfoundland Savings Bank*, [1899] A.C. 281 at 285, 286. *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A.C. 49 at 54, C.R. [13] A.C. 41.

Entirely heterogeneous in their nature are the bills or notes which were issued by the chartered banks under the authority of The Bank Act 1934, and are, in the language of that Act, and of The Bank of Canada Act, “intended for circulation” that is, they are intended to afford a supply of paper currency. A bank note, as regards its form and essential requirements, is simply the promissory note of a bank payable to bearer on demand: *Reg. v. Brown* (1854), 8 N.B.R. 13; and its issue, transfer, and discharge are governed by the provisions of The Bills of Exchange Act relating to a note payable to a bearer on demand. See Falconbridge on Banking and Bills of Exchange, 5th ed., p. 140, and authorities cited in Note (a). Notes of the Bank of Canada and Dominion notes are legal tender: The Bank of Canada Act, 1934 (Dom.), c. 43, ss. 24-25. Notes of other banks

are not legal tender. Bank notes must, however, be received in payment, or redeemed on payment, by the issuing bank: The Bank Act, 1934 (Dom.), c. 24, s. 70. Moreover, in the event of the suspension by a bank of payment in specie or Dominion or Bank of Canada notes of any of its liabilities as they accrue, the notes of the bank issued or reissued and intended for circulation are, if the directors of the bank, or liquidator, etc., fail to make arrangements within two months from the date of suspension of payment by the bank for the payment of all its notes and interest thereon at the rate of 5 per cent. from such day, made redeemable by the Minister of Finance out of the bank circulation redemption fund to which all banks are required to contribute: The Bank Act, 1934, (Dom.), c. 24, ss. 65-66. Bank notes are thus given a quality as paper currency analogous to notes of the Bank of Canada and Dominion notes. The expressions "bank bills" and "bank notes" are synonymous: 6 Corpus Juris, 1180, 1183; *State v. Wilkins* (1845), 17 Vt. 151 at 156; *Brown v. The Commonwealth* (1811), 8 Mass. 59. Indeed, in ss. 72 and 73 of The Bank Act, R.S.C. 1927, c. 12, the expression "bank notes and bills" is used to describe the paper currency which the chartered banks are authorized to issue and reissue. The draftsman of The Bank Act, 1934, evidently considered the expression tautological, as in the corresponding sections (72 and 73) of that Act, he substituted for "bank notes and bills" the words "bank notes."

It is noteworthy that s. 72 of R.S.C. 1927, c. 12, speaks of the "bills or notes of the bank" just as s. 130(2) of The Election Act, R.S.O. 1937, c. 8 speaks of "the bills of any chartered bank," and in this phrase, "of" is clearly used in the sense of "issued or reissued by" any chartered bank.

Bank bills, or bank notes, alone, fall within the connotation of the words "the bills of any chartered bank".

A cheque, even though marked "accepted", is still a bill of exchange "drawn on" a bank; it is not a bill of the bank on which it is drawn; it is not issued or reissued by the bank in the same way as are bank bills or bank notes.

In Maxwell on the Interpretation of Statutes, 8th ed., p. 284, it is said: "When two or more words which are susceptible of analogous meaning are coupled together *noscuntur a sociis*. They are understood to be used in their cognate sense. They take, as it were, their colour from each other, that is, the more

general is restricted to a sense analogous to the less general." In the present case the connotation of the words "the bills of any chartered bank" with the preceding words "in legal tender" strongly indicates that what the Legislature had in mind were bank bills or notes which circulate as paper currency in the same way as Bank of Canada or Dominion notes, although without the latter's quality of being legal tender.

On other grounds, I am satisfied that this would not be a proper case in which to grant a *mandamus*.

The authorities seem to be clear that a County Court judge is, in relation to his jurisdiction on an application for a recount under an enactment like s. 130 of The Election Act, acting in a judicial capacity: *McLeod v. Noble et al.* (1897), 28 O.R. 528 at 546, and citations there given of Hawkins J. in *In re Thornbury Division of Gloucestershire Election Petition*; *Ackers v. Howard* (1886), 16 Q.B.D. 739, per King J., in *Ex parte Baird* (1890), 29 N.B.R. 162 at 196; and see, also, *In re Sunbury and Queen's Election*; *Smith v. McLean* (1911), 10 E.L.R. 221 at 225. Where, accordingly, a tribunal of that character has in fact heard and determined any matter within its jurisdiction, *mandamus* does not lie to compel it to reconsider or reverse its decision. Moreover, when the inferior court has entered on the hearing, and from the evidence decides that it has not jurisdiction, a *mandamus* will not lie commanding it to hear and determine, even though its decision be wrong in point of law: 7 C.E.D. (Ont.), pp. 137-8; 9 *Halsbury*, 2nd ed., pp. 764-5; *Ex parte Milner*; *In re Milner v. Rhoden* (1851), 15 Jur. 1037, quoted with approval by Boyd C., in *Re Ratcliffe v. Crescent Mill and Timber Co.* (1901), 1 O.L.R. 331. See, also, *Ford v. Crabb* (1851), 8 U.C.Q.B. 274; *In re Ottawa Municipal Election*; *By Ward*; *Rideau Ward* (1895), 26 O.R. 106 at 108; *In re Parsons and Toms*; *In re Voters' List of Goderich* (1875), 36 U.C.Q.B. 88.

There is, perhaps, still another ground upon which *mandamus* should be refused in this case. In *In re Centre Wellington Election* (1879), 44 U.C.Q.B. 132, the Court refused a *mandamus* to the Junior Judge of the County of Wellington to proceed with the recount of votes under 41 Vic. (Dom.), c. 6, s. 14, as being a matter not within its jurisdiction but belonging to Parliament alone. This decision was followed by Boyd C. in *McLeod v. Noble et al.*, *supra*, and Osler J.A. expressed his concurrence with the principle in *McLeod v. Noble* (1897), 24 O.A.R. 459 at 466. It may

well be that the same principle extends to matters touching the jurisdiction of a County Court judge to hold a recount of the ballots cast at an election for the Legislative Assembly for the Province; upon this point I express no opinion.

The application is, accordingly, dismissed with costs.

Application dismissed with costs.

Solicitor for the applicant: F. A. Brewin, Toronto.

[COURT OF APPEAL.]

**Tregunno v. Aldershot Distributing Co-operative Company
Limited.**

Sale of Goods—Implied Warranties—Sale of Peaches by Grower to Wholesaler for Resale—Extent of Warranty as to Merchantable Condition—The Sale of Goods Act, R.S.O. 1937, c. 180, s. 15(b).

Where the grower of peaches sells them to a wholesaler for resale, and nothing is said at the time of the sale to the effect that the peaches are to be shipped over a "long haul", the implied warranty under s. 15(b) of The Sale of Goods Act, R.S.O. 1937, c. 180, is satisfied and ended if the peaches are delivered in sound condition at the place named in the contract, and the seller is given a reasonable opportunity to inspect them and deal with them in the ordinary course of business. The buyer must bear the loss if, in the exercise of his own judgment, he decides to ship them to a distant point, and they spoil in the course of shipment. *Jackson v. Rotax Motor and Cycle Company*, [1910] 2 K.B. 937, applied; *Beer v. Walker* (1877), 46 L.J.C.P. 677, distinguished; *Luxor (Eastbourne), Limited et al. v. Cooper*, [1941] A.C. 108, and other authorities, referred to.

AN appeal by the plaintiff from the judgment of Roach J., noted in [1943] O.W.N. 431. The facts are fully stated in the judgment of LAIDLAW J.A.

14th and 15th October 1943. The appeal was heard by RIDDELL, HENDERSON and LAIDLAW JJ.A.

J. L. G. Keogh, for the plaintiff, appellant: The trial judge found as a fact that the peaches complied with the contract and that they were purchased by the respondent f.o.b. the appellant's packing house or siding. He further found that deterioration in the peaches took place after property had passed to the respondent; it was not incumbent upon the appellant to ship the peaches anywhere. There was no evidence from which any such warranty could be implied in fact. The respondent's allegation that we agreed to deliver long haul peaches is expressly disbelieved by the trial judge. If any warranty is to be implied by law against the appellant, it extended only to the

time of delivery of peaches to the respondent. [RIDDELL J.A.: You were not taking the responsibility of shipping long distances.] [HENDERSON J.A.: The question whether or not there was an implied warranty is one of law, not of fact.] The trial judge placed great reliance on the case of *Beer v. Walker* (1877), 46 L.J.C.P. 677. This case is distinguishable on the facts from the present case. There it was not clear where delivery was to be made, but in this instance the place of delivery was the appellant's packing house, as to the first sale, and the appellant's railway siding as to the second sale. We agreed to supply good firm peaches and when they were loaded on to the trucks they passed an inspection. We were not selling peaches for Halifax; they were f.o.b. on our farm. The risk of deterioration of these peaches was in the respondent after the property in them passed to it, and they had been delivered to it f.o.b.: *Atlantic Fruit Co. v. Oke* (1919), 16 O.W.N. 121 at 122 and 123; *Stock v. Inglis* (1884), 12 Q.B.D. 564 at 573; The Sale of Goods Act, R.S.O. 1937, c. 180, ss. 21 and 19 (e), Rule 5. If *Beer v. Walker* is applicable, which we say it is not, it conflicts with the statute just cited, and in case of conflict, the statute will prevail. If the law is otherwise than we are contending, no fruit grower would ever know if he had made a legal sale until the shipper found whether the fruit was good on arrival: *Ollett v. Jordan* [1918] 2 K.B. 41 at 47; *Mayhew v. Scott Fruit Co.* (1915), 21 D.L.R. 54 at 58, 8 Alta. L.R. 66, 7 W.W.R. 1140, 30 W.L.R. 466. By re-selling the peaches, the respondent accepted them as being in compliance with its contract with the appellant: The Sale of Goods Act, s. 34; *Hardy and Company v. Hillerns and Fowler*, [1923] 2 K.B. 490. [LAIDLAW J.A.: Is not the only question whether an implied warranty continued to exist after ownership in the peaches had passed?] S. 32 of The Sale of Goods Act does not apply. We only agreed to put the peaches on our own trucks. We gave shipping orders to the railway merely as agent for the respondent and in accordance with its manager's instructions. With regard to sale number one there is an intimation of acceptance within s. 34 of The Sale of Goods Act. There is strong evidence that the warranty had been complied with at that time. [HENDERSON J.A.: There may be evidence that the warranty was complied with at that time. The question is how far that warranty extends.] The preponderance of evidence established a general custom of the

peach trade that in the absence of use by the respondent of a "brown rot stamp" or an "open price" the risk of loss from brown rot fell upon the respondent. The trial judge erred in holding that this evidence did not go far enough to establish such a general custom. If evidence is clear from the witnesses regarding the custom of the trade, it should be allowed: *Pitcher v. Bingay* (1888), 21 N.S.R. 31.

We dispute the counterclaim allowed to the respondent for freight and icing railway charges on the car involved in sale number two. This was not a loss attributable directly to any breach of warranty by the appellant. On the contrary, it was a voluntary payment made by the respondent on behalf of his consignee. It was the liability of the consignee, not of the respondent at all. The respondent paid this, not under any compulsion, but simply at the request of his customer. The contract clearly provides that charges of this kind are to be borne by the consignee. If the respondent saw fit to pay the charges, he has no claim against us.

J. R. Cartwright, K.C., for the defendant, respondent: The main question to be considered is whether the trial judge was right in his view of the extent of the warranty. The peaches were sold by description. The seller knew they were for distant points and that they were for re-sale to the retail trade. The cars were properly iced and not delayed. When they arrived at their respective destinations the peaches were rotten. In these circumstances, was the warranty implied by law only that the peaches should be merchantable on the premises of the grower, or should it be implied for a reasonable time thereafter to allow for a re-sale? We rely on *Beer v. Walker* (1877), 46 L.J.C.P. 677, referred to and applied by the trial judge in his judgment. The appellant seeks to distinguish the case on three grounds: (1) That it was doubtful whether the property had passed in that case. It is clear that the Court regarded that point as being of no importance. It is our submission that this authority is good law and applicable to the case at bar. [LAIDLAW J.A.: Did the appellant know the peaches were being purchased for consumption in Halifax? Was it part of the bargain that the vendor was supplying peaches for consumption in Halifax?] It was a sale of unascertained goods by description, and since they were to be used as human food there must be an implied warranty that the goods will be fit for the purpose for which they are in-

tended to be used; and such warranty continues until the purchaser has a reasonable opportunity of dealing with them in the ordinary course of business: 29 Halsbury, 2nd ed., p. 141, s. 174. [HENDERSON J.A.: Is there no authority in our courts as to how far implied warranty goes?] *Sims Packing Co., Ltd. v. Corkum & Ritcey, Ltd.* (1920), 53 D.L.R. 445 at 447, 53 N.S.R. 539, is a case from the Nova Scotia Court of Appeal. Their Sale of Goods Act is similar to ours and if that case is good law it is decisive on this point. Another authority on the question whether goods were in a merchantable condition is *Niagara Grain and Feed Co. v. Reno* (1916), 32 D.L.R. 576, 38 O.L.R. 159 at 162. There is no case in Ontario directly in point. *Atlantic Fruit Co. v. Oke* (1919), 16 O.W.N. 121, is clearly distinguishable on the facts, and in no way attacks the law. There, the goods were merchantable when delivered to the purchaser and would have so remained except for two serious mishaps, delay and non-icing, both the fault of the railway company. *Stock v. Inglis* (1884), 12 Q.B.D. 564, deals with the question when the property passes, and does not really touch the problem presently facing the Court. Even though property has passed to us, the warranty has continued for a reasonable time. The appellant states that by re-selling the property, we accepted the goods. Under *Beer v. Walker* this does not matter; although the property passed, the warranty continued. [HENDERSON J.A.: If this implied warranty was as set out in *Beer v. Walker*, it does not matter who has the ownership of the goods.] The converse would also put a hardship on the purchaser.

The trial judge was right in holding that the plaintiff had failed to establish a general custom in the trade that, in the absence of the use of a "brown rot stamp", or an "open price", the risk as to loss due to brown rot fell upon the defendant. In any event, if the plaintiff intended to rely on any such usage, it was necessary for him to plead it, and he failed to do so: Odgers, Pleadings and Practice, 12th ed. p. 79; 10 Halsbury, 2nd ed., pp. 60-62, ss. 77 to 80.

As to the counterclaim, it can hardly be argued that the payment was voluntary when the respondent was compelled to make it and the loss of the same was directly attributable to the breach of the appellant's warranty: *Honeywill and Stein, Limited v. Larkin Brothers (London's Commercial Photographers, Limited)*, [1934] 1 K.B. 191. It is a question of fact whether the

goods were in a merchantable condition for a reasonable time after being loaded on the cars. The trial judge has found as a fact that the peaches did not stay good for a reasonable period of time: Benjamin on Sale, 7th ed., p. 673.

F. B. Eddy, for the defendant, respondent: The refrigeration in the cars was more than adequate. Evidence of expert witnesses shows that brown rot spores develop slowly and the germ of the disease might well have been present at the time the peaches were loaded on to the cars.

J. L. G. Keogh, in reply: We never agreed to supply peaches to be shipped to Halifax. The respondent seeks to have this Court hold that we so contracted. Since he did not cross-appeal, he is bound by the finding of the trial judge in this respect. The purchaser had a reasonable time to deal with the peaches. It is not necessary for us to give the sub-purchaser a reasonable opportunity to deal with them. The appellant was being paid for peaches on his farm, not peaches in Halifax. *Beer v. Walker* might be good law as between the consignee and the respondent, but not as between the appellant and the respondent.

Cur. adv. vult.

10th November 1943. RIDDELL J.A.:—At the conclusion of the argument of this appeal from a judgment dismissing the action, I was strongly impressed with the view that the appeal could not succeed—a view that was in no wise lessened on a perusal of the evidence. A perusal of the reasons for judgment of my learned brother caused me to go into the whole matter, legislative and otherwise, and I am now convinced that my conclusions, agreeing as they did with those set out in the very careful and exhaustive reasons of the learned trial judge, could not be sustained, in view of the legislation.

I am of the opinion that my brother Laidlaw's judgment is right in every respect; and I agree with his reasons and conclusions and agree that the appeal must be allowed as set out in his judgment.

HENDERSON J.A.:—I have had the privilege of reading the opinion of my brother Laidlaw. I agree with his reasons and conclusions and have little to add.

The contract between the vendor and the purchaser was for the sale and delivery to the latter, and the title and possession passed to the purchaser on delivery to it.

The learned trial judge found against the contention of the purchaser that at the time of sale anything was said about a long haul, and with this finding and upon the evidence the vendor had no reason to suppose that the peaches were for other than local distribution. Later, when he learned otherwise from instructions he received as to shipments, he was, in my opinion, the agent of the purchaser. His contract of sale and purchase was completed.

Under these circumstances in my opinion there can be no implied warranty such as was found in the case relied on in the judgment below.

LAILAW J.A.:—The plaintiff appeals from a judgment of Roach J., dated 16th June 1943, whereby an action for the balance of the purchase price of certain goods sold and delivered by the plaintiff to the defendant was dismissed and part of a counterclaim for loss sustained by the defendant by reason of an alleged breach of warranty on the part of the plaintiff was allowed.

The plaintiff is a fruit grower in the Niagara peninsula. The defendant is a wholesale fruit distributor carrying on the business of purchasing fruit in that district and reselling and shipping it to its customers in various parts of Canada.

In September 1942 the plaintiff sold to the defendant four lots of peaches, described in the trade as "good firm peaches". The sale was arranged orally by telephone. The peaches were to be delivered by the plaintiff f.o.b. at his packing house situate on his farm or at an adjoining railway siding. They were delivered in accordance with the terms and conditions of the verbal agreement between the parties. At the time of delivery the goods were free from any visible defects and complied with the description of fruit as specified by the defendant. At the time of the sale the plaintiff did not know the ultimate destination of the goods. The representative of the defendant company stated that he ordered "good long haul peaches". The learned judge says: "I am of the opinion that the expression 'long haul' is an afterthought by him and was not used by him when ordering these peaches." After the agreement for sale was made the plaintiff received shipping instructions from the defendant, and then had knowledge that two car loads were destined to far-distant places.

One lot of peaches was taken by motor truck to the warehouse of the defendant at Aldershot, Ontario. It was there inspected and passed by a government fruit inspector, and within a few days thereafter the managing director of the defendant commented favourably on these particular peaches. Part of the lot was shipped by the defendant by rail to one of its customers at New Dryden, Ontario; part was shipped to Amherst, Nova Scotia; the remainder was put in the defendant's cold storage warehouse. The peaches shipped to New Dryden were quite rotten on arrival there; there is no evidence as to the condition at destination of the peaches sent to Amherst; the peaches placed in the defendant's cold storage warehouse remained there two or three weeks, during which time they became so badly affected by brown rot that they were a total loss.

Two lots of peaches, comprising two refrigerator carloads, were shipped, in accordance with instructions given to the plaintiff by the defendant subsequent to the sale, to Halifax, Nova Scotia, and arrived there five or six days later. On arrival it was found the contents of both cars had shifted in transit, resulting in some of the peaches being crushed. The peaches were badly decayed with brown rot.

The fourth lot of peaches was shipped in a refrigerator car with the vents open and the plugs out, as required by the defendant, to Aldershot. It is said that during transit the vents and plugs were interfered with and reversed in position. The peaches showed considerable brown rot on arrival. The defendant attributed the bad condition of the peaches to interference with the vents and plugs, and made a claim against the carrier.

The learned trial judge held "that before deterioration the property in the peaches had passed to the defendant" and that "there was an implied warranty by the vendor, not only that the peaches would be merchantable and fit for human consumption at the time of delivery to the carrier, but also that they would remain merchantable and fit for human consumption for a reasonable time after arrival." He finds "that there was a breach by the vendor of the implied warranty above stated, and for this reason the plaintiff's action must fail". The defendant's counterclaim for payments of money made to the plaintiff on account of the purchase price of the peaches was dismissed "for the reason that those payments were made with full knowledge of the condition of the peaches of which it now complains. They

were voluntary payments, and are not now recoverable." He declined to allow certain charges paid by the defendant to the railway for the shipment to Aldershot. He allowed to the defendant the freight and icing charges paid by it to the railway on the two carloads of peaches shipped to Halifax as "a loss suffered by the defendant attributable directly to the plaintiff's breach of warranty in respect of that sale, and the defendant is entitled to recover that loss from the plaintiff."

The Court must now consider the nature and extent of the warranty on the part of the grower of fruit on a sale to a wholesale dealer and distributor. Does the warranty relate only to the time and place of such sale, or does it cover deterioration during shipment by the wholesale dealer after resale by it to its customers? It is to be observed at once that the property in the goods passed from the plaintiff to the defendant before deterioration occurred; possession also had likewise passed to the defendant; it had control and complete freedom to deal with the peaches in such manner as it saw fit; it could store them for a short or a long period; it could dispose of them on its own terms and conditions to its customers near or far; it could distribute them to such places and at such times as their own needs and business demanded; it could ship them by whatever means or with whatever protection against loss or damage it might select. On the other hand the plaintiff had no right to dictate or control in any manner the action and dealings of the defendant. One fruit shipper with thirty-one years' experience in the Niagara peninsula gave evidence on behalf of the defendant, and testified: "We send no fruit long-haul when brown rot is prevalent, because I think it is suicide to ship peaches infested with brown rot spores on long hauls." But the plaintiff could not object to the defendant doing so, and at the time of the sale he did not know to what place or places the defendant might distribute them. The plaintiff says: "He would not tell us where they were going; he would just call and say he wanted a car of good peaches."

The defendant does not suggest that the plaintiff gave an express warranty that the goods would be merchantable and fit for human consumption at the ultimate market and destination. Counsel for the defendant argues that such a term is implied and imported into the contract between the plaintiff and the defendant. The contract to be considered is the one made at

the time the defendant ordered the goods, and it is essential to note that the defendant did not then inform the plaintiff that the peaches to be supplied were for "long haul." Generally "implied terms" can only be justified under the compulsion of some necessity: per Lord Russell of Killowen in *Luxor (Eastbourne), Limited et al. v. Cooper*, [1941] A.C. 108 at 125. But Lord Wright, at p. 137, says, "The expression 'implied term' . . . Sometimes . . . denotes some term which does not depend on the actual intention of the parties but on a rule of law, such as the terms, warranties or conditions which, if not expressly excluded, the law imports, as for instance under the Sale of Goods Act."

A warranty by the plaintiff that the goods would be in merchantable condition and fit for human consumption when they reached the possession of the defendant's customer cannot be implied or justified "under the compulsion of some necessity." I look then to the provisions of The Sale of Goods Act, R.S.O. 1937, c. 180. S. 15 reads in part as follows:

"15. Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows,

"(a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose; . . .

"(b) where goods are bought by description from the seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed."

The provisions of clause (a) above quoted are not applicable to the facts of this case. While the plaintiff knew, or may be taken to have known, that the defendant required the goods for the purpose of resale and shipment to its customers, there is no evidence to show that the defendant relied on the plaintiff's skill or judgment as to the fitness of the goods for such purpose. On

the contrary, the defendant used the skill and judgment of its own servants or advisers, and exercised its own discretion in the matter. If it made a mistake and took a chance which a reasonable shipper would not have taken in the circumstances, it cannot put the responsibility for any resulting loss on the plaintiff.

I consider clause (b). The goods were "bought by description from the seller who deals in goods of that description". The buyer did not examine the goods. If its representative had done so, the examination would not have revealed any defects. The sole question is, to what place and time does the implied condition "that the goods shall be of merchantable quality" relate? The learned trial judge holds that the implied warranty by the plaintiff is binding on him "not only . . . at the time of delivery to the carrier, but also . . . for a reasonable time after arrival." He puts on the plaintiff a responsibility for the condition of the fruit after the ownership, possession and control of it has passed to a purchaser from him; keeps the implied warranty in force during the period of resale and shipment by that purchaser to another purchaser, also "for a reasonable time after arrival". He refers to and relies on *Beer v. Walker* (1877), 46 L.J.C.P. 677. In that case the plaintiff was a wholesale provision dealer and contracted to send weekly, from London, to the defendant, at Brighton, a certain number of rabbits. The question argued and decided was whether a warranty that the rabbits were fit to be used for human food was satisfied by the delivery of the goods by the vendor to the railway at the place of shipment or "whether the warranty was not such that if nothing happened out of the ordinary course, the rabbits should reach the person for whom they were destined in good order and fit for human food": per Grove J., at p. 679. It is to be noted that the issue was between the wholesale dealer, as vendor, and his customer as vendee. No question arose as to the nature or extent of the warranty, if any, by the person who sold the rabbits to the plaintiff. The question before the Court related to the warranty as between the wholesale dealer and his customer. It was decided that the place of receipt of the goods by the purchaser marked the place to which the warranty extended and it continued there a sufficient time to give him a reasonable opportunity of dealing with the goods in the ordinary course of business. See also *Sims Packing Co., Ltd. v. Corkum & Ritcey, Ltd.* (1920), 53 D.L.R. 445, 53 N.S.R. 539. The defendant in the case pres-

ently under consideration is no doubt bound to his customer by such an implied warranty as a term of the contract between them. But I do not find the cases cited to be authority that such a warranty by the plaintiff attaches and runs concurrently to the place of delivery of the goods to the defendant's customer.

The contract to be considered is between the grower as plaintiff and the wholesale dealer as defendant. Importing into that contract the implied condition that the goods shall be of merchantable quality, and applying the proper principle of law, I think the condition is satisfied after the defendant had a reasonable opportunity of dealing with the goods in the ordinary course of business at the place where delivery of them in that condition was made to it by the plaintiff.

In *Jackson v. Rotax Motor and Cycle Company*, [1910] 2 K.B. 937, Kennedy L.J., at p. 950, says: "I do not think we can treat 'merchantable quality' as meaning something which can be made merchantable—it is something which is merchantable at the time when the tender is made by the seller." There is no evidence or suggestion that the fruit was not of merchantable quality when it was delivered to the defendant. It had sufficient time and opportunity after such delivery to deal with the goods in the ordinary course of business. Moreover it exercised the opportunity and dealt with the goods by resale and storage. When the opportunity passed, the warranty of the plaintiff ended. The defendant had complete freedom to use its own skill and judgment as to distribution and disposition of the goods; it cannot, I think, blame the plaintiff for damage subsequently arising through a latent invisible condition; it cannot hold him responsible, on the ground of an implied contract, for loss which occurred later, in the course of its dealings with its own customers. To place such a burden and responsibility on the grower of fruit, in the absence of express agreement on his part, would be unreasonable and unjust. I venture to think that few, if any, growers would be willing to sell their crops under such conditions. They would demand prices commensurate with the risk and insist upon measures specified by them as to protection of the goods in transit. In this instance the grower has done everything physically possible to guard against defects in the fruit produced and sold by him. What more can he be justly required to do than to deliver the goods free from visible defects to a buyer from him and give that buyer at the place of delivery to

him the opportunity I have described? Alderson B. in *Bull v. Robison* (1854), 10 Ex. R. 342, at p. 345, 156 E.R. 476, at 477, said: "Any warranty implied by the law must be a reasonable warranty, and cannot be one which it is physically impossible to comply with." That is a clear sound statement of law, and the principle may be properly applied to the facts of the case presently before the Court.

My judgment is that the appeal should be allowed with costs; the plaintiff is entitled to judgment for \$1,067.64, without interest, being the balance of the purchase price of the goods, together with costs of the action. The counterclaim should be dismissed without costs.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: Bench, Keogh & Cavers, St. Catharines.

Solicitor for the defendant, respondent: Foster B. Eddy, Hamilton.

[COURT OF APPEAL.]

Shapiro et al. v. Wilkinson.

Motor Vehicles — Negligence — Statutory Onus — How Onus Discharged — Insufficiency of Showing that Plaintiff's Negligence partly Responsible — Charge to Jury as to Particular Matters of Negligence — How Far Jury Must Agree on Finding — The Highway Traffic Act, R.S.O. 1937, c. 288, s. 48(1).

A motorist cannot discharge the onus placed upon him by s. 48(1) of The Highway Traffic Act, R.S.O. 1937, c. 288, by showing that the plaintiff's loss or damage has been caused in part by the plaintiff's own negligence. He must show that there has been no misconduct or negligence on his own part, and if the jury are of the opinion that the loss or damage was caused partly by the plaintiff's own negligence and partly by that of the defendant, they must answer in the negative a question as to whether the defendant has satisfied the onus. It is therefore misdirection to tell the jury that the defendant may satisfy the onus "by showing that it [the damage] was caused, in whole or in part, by the negligence of the plaintiff", and if the jury, so instructed, answer the question as to onus in the defendant's favour, there must be a new trial.

The jury must consider the accident from all points of view, and must be satisfied that the defendant has not been negligent in any way. They are not limited to any allegations of negligence which the plaintiff may have made or which his counsel, in addressing the jury, may have stressed, and the defendant cannot discharge the onus by showing that he has not been negligent in certain particulars. It may be that the jury, while they may not be able to find any specific act or omission constituting negligence or misconduct, will nevertheless not be satisfied that the plaintiff's loss or damage did not arise through negligence or misconduct of the defendant, and in such circumstances they must answer the question as to onus against the

defendant. *Newell et al. v. Acme Farmers Dairy Ltd.*, [1939] O.R. 36; *Bronson v. Evans and Evans*, [1943] O.R. 248, applied. It is desirable that the trial judge should explain to the jury that the onus is upon the defendant throughout the trial, and never shifts. *Winnipeg Electric Company v. Geel*, [1932] A.C. 690 at 695, applied. He should also explain to them that it is not necessary that ten jurymen should agree on their reasons for an answer to the question as to onus, and that each jurymen may have a different ground for his answer. *Newell et al. v. Acme Farmers Dairy Ltd.*, *supra*, referred to.

AN appeal by the plaintiffs from the judgment of McFarland J., entered on the findings of a jury. The facts are fully stated in the judgment of LAIDLAW J.A.

2nd November 1943. The appeal was heard by RIDDELL, GILLANDERS and LAIDLAW JJ.A.

I. *Levinter, K.C.*, for the plaintiffs, appellants: There was both misdirection and nondirection. The jury were not properly charged as to contributory negligence or on the law as to a motorist's duty to keep a proper look-out, and the consequences in law of a failure to see. Since the enactment of The Negligence Act, R.S.O. 1937, c. 115, a defendant cannot satisfy the statutory onus by showing that the plaintiff was guilty of contributory negligence, because there must be a division of blame. The crucial question is whether the defendant has satisfied the jury that he is not to blame. The judge did tell the jury that there was an onus on the defendant, but he said this could be discharged by showing that the accident was caused in whole or in part by the negligence of the plaintiff. This is not correct; if it was partly caused by the plaintiff, the jury can still find the onus has not been satisfied and apply The Negligence Act. The meaning of s. 48(1) of The Highway Traffic Act, R.S.O. 1937, c. 288, should have been more fully explained, and interpreted in the light of such cases as *Winnipeg Electric Company v. Geel*, [1932] A.C. 690 at 695, [1932] 4 D.L.R. 51, 40 C.R.C. 1, [1932] 3 W.W.R. 49; *Newell et al. v. Acme Farmers Dairy Ltd.*, [1939] O.R. 36, [1939] 1 D.L.R. 51; *Bronson v. Evans and Evans*, [1943] O.R. 248, [1943] 2 D.L.R. 371.

There are many decisions in which the jury's verdict has been reversed because they could not reasonably have come to the conclusion they did on the evidence. [LAIDLAW J.A.: Your argument is that the only finding the jury could reasonably make was that the defendant, had he been keeping a proper look-out, could have avoided the accident?] Yes; there was a similar situation in the case of *Katz v. Taylor*, [1939] O.W.N.

482, [1939] 4 D.L.R. 468. [LAIDLAW J.A.: The facts in every case and the evidence of each case have to be considered by themselves. In this instance, the jury must have thought there was no opportunity for the defendant to avoid the accident.] The defendant's failure to see what he should see is negligence in law: *White v. Hegler* (1916), 10 Alta. L.R. 57, 10 W.W.R. 1150, 34 W.L.R. 1061, 29 D.L.R. 480 at 486. [LAIDLAW J.A.: This Court will interfere only if there was no evidence for the jury to find as they did, or if their finding amounts to injustice.] [RIDDELL J.A.: We do not inquire if another finding might equally well be made.] The plaintiff was entitled to have the law explained to the jury with a direction as to how it should be applied: *Spencer v. The Alaska Packers Association* (1904), 35 S.C.R. 362 at 371. The provisions of s. 48(1) of The Highway Traffic Act apply, and the burden was on the defendant to prove that the plaintiff's loss and damage did not arise through the negligence or improper conduct of the defendant.

E. L. Haines, for the defendant respondent: The jury found that the defendant had satisfied the onus. As long as it is apparent on all the facts that there is evidence to support their finding, it ought not to be attacked. The judge's charge must be regarded in its entirety, not sectionally. If this is done, it can fairly be said to be a complete and proper charge. In regard to the question of onus, the jury must address themselves as to the nature of the negligence. [RIDDELL J.A.: The whole case resolves itself into whether the trial judge explained to the jury what was necessary for them to determine under the statute.] [LAIDLAW J.A.: The appellant claims that part of the charge does no more than quote the statute. It is not explained as a matter of law what onus means.] The judge referred to all necessary matters in his charge and the jury were entitled to believe the defendant. Since they did so and were satisfied that, in the situation which confronted him, he had not failed in that standard of care, skill and judgment which can fairly and properly be required of a motorist, this appeal should fail.

I. Levinter, K.C., in reply: In charging on s. 48(1) of The Highway Traffic Act, the trial judge should have instructed the jury that the burden of proof remained on the defendant throughout to the end of the case, and was not a shifting onus. The jury

should also have been told that they did not have to find a specific act of negligence.

Cur. adv. vult.

18th November 1943. RIDDELL J.A. (*dissenting*):—In this appeal from the judgment at the trial dismissing the action, the sole ground of appeal argued before us was the alleged failure of the learned trial judge, Mr. Justice McFarland, properly to charge.

That a failure to properly charge the jury is a perfectly good ground for interfering with the finding of a jury by a Court of Appeal cannot be doubted—and that, even if the charge is to the satisfaction of the counsel at the trial. We must, therefore, examine the charge, and if it appears improper give the relief sought, if possible on the evidence.

In the present case, it cannot be said that the jury would not have been justified in finding the facts adversely to the defendant; and the charge becomes, perhaps, more important.

It is the case of a motor accident and so comes within the provisions of The Highway Traffic Act, R.S.O. 1937, c. 288, s. 48(1).

Examining the charge, I find nothing to find fault with. The learned judge near the beginning of his excellent charge points out the difference between his function and that of the jury, he being concerned with the law, they with the facts. Then, stating that the action was based upon alleged negligence, he carefully defines negligence. He then says:

“Now you have been told, as the fact is, that there is a very radical difference in this case from certain other cases involving motor accidents. The Legislature have deemed it wise to, what is called, shift the onus. Ordinarily when a plaintiff comes into court and claims damages, alleging a negligent act or acts on the part of the defendant, the plaintiff must prove, to your satisfaction, the negligence alleged on the part of the defendant. That is what is called ‘the onus of proof.’ Ordinarily the onus of proof is on the plaintiff, but in cases involving contact between a motor car and a pedestrian, and certain others, the Legislature has made special provision. S. 48(1) of The Highway Traffic Act reads as follows:

“48. (1) When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof

that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver.'

"In this case, to put it frankly, the onus is upon the defendant Wilkinson to satisfy you that the injuries to the plaintiff were not caused by his negligence."

There was nothing in the charge that in any way modified this statement of what the law called upon the defendant to do, and question No. 1 put to the jury is beyond question—it reads and is answered:

"1. Has the defendant Angus Wilkinson satisfied you that the loss or damage of the plaintiffs did not arise through negligence or improper conduct on his part? Answer Yes or No." Answer: "Yes."

Being unable to find fault with the charge, question or answer, I think that the appeal must be dismissed with costs.

GILLANDERS J.A.:—Reluctant as I am to direct a new trial I think that must be the result. I agree with the reasons given and the disposition made by my brother Laidlaw.

LAIDLAW J.A.:—This is an appeal from a judgment of McFarland J., dated 9th June 1943, after a trial with a jury, at Toronto. On the findings made by the jury the learned trial judge dismissed the action with costs, and the appellants now ask for a new trial.

The appellants seek to recover damages for injuries sustained by the appellant Mary Shapiro, and for expenses incurred by her husband, the appellant Joseph Shapiro, as a result of an accident on or about 27th September 1942. It is alleged in the statement of claim that "The Plaintiff Mary Shapiro was proceeding across the highway known as Bloor Street West . . . from the north to the south side . . . and was at a point between the centre line of the said highway and the southerly curb when she was struck by the motor car owned and operated by the said Defendant, which said motor car was proceeding in an easterly direction on the said highway." The defendant says in the statement of defence, *inter alia*, that there was no breach of duty on his part; that "such motor vehicle was being operated carefully, prudently, at a reasonable rate of speed and in accordance with all the laws pertaining to the operation of such motor vehicle upon a highway, and . . . that the Plaintiffs'

damages were caused solely by the negligence of the Plaintiff Mary Shapiro”.

The jury found that it was satisfied by the defendant that the loss or damage of the plaintiffs did not arise through negligence or improper conduct on his part.

The appellants argue that there was misdirection and non-direction by the learned trial judge to the jury. It is said that there was not proper or sufficient instruction to the jury as to the onus of proof resting on the defendant under s. 48(1) of The Highway Traffic Act, R.S.O. 1937, c. 288; that, in effect, the case was put to the jury “on the basis that the plaintiffs were alleging negligence”; and other grounds of objection were urged which need not now be considered. S. 48(1) of The Highway Traffic Act reads as follows:

“48. (1) When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver.”

The learned judge said in his charge: “In this case, to put it frankly, the onus is upon the defendant Wilkinson to satisfy you that the injuries to the plaintiff were not caused by his negligence.” No objection could possibly be made to that statement, but the learned judge continues at once: “I should also go on to say that when a defendant is called upon to prove that the damage was not caused by his negligence or improper conduct, he might prove it by showing that it was caused, in whole or in part by the negligence of the plaintiff. And that is the allegation set up here.” The defendant cannot discharge the onus upon him under s. 48(1) of The Highway Traffic Act by showing that the plaintiffs’ loss or damage was caused in part by the negligence of the plaintiff. That can only be done by the defendant showing that there was no negligence or misconduct on his part. If the loss or damage sustained by the plaintiffs arose in part by the negligence of the plaintiff Mary Shapiro, and in part by the negligence of the defendant, the jury must find that the defendant has not satisfied the onus of proof as provided in the statute, and answer the appropriate question in the negative.

In my opinion the learned trial judge was in error in the instruction he gave to the jury, as quoted. The error is one

going to the very basis of their proper understanding of the burden of proof cast by law on the defendant. I think that after such a statement, and in the absence of explicit correction of the error, a jury could not properly and justly answer the question as to whether the defendant had satisfied the onus of proof. An answer following that incorrect instruction cannot be permitted to form the basis of a judgment of the Court.

Counsel for the appellants argues that the learned trial judge put the case to the jury as if the plaintiffs were alleging negligence on the part of the defendant. I quote from the charge the portion to which objection is particularly made:

"I am now going to comment, not at any great length, on some phases of the evidence. As to the facts of the accident, I think you are very well aware. I may perhaps say something about that later, but as I see it, the negligence of the defendant, alleged by the plaintiff, was, first of all, not keeping a proper lookout. And that is the main one. Secondly, she says that the lights on the car were dim; although I am bound to say that that evidence was offered by nobody else; on the contrary, the policeman said that the lights were burning brightly. Thirdly, the question of speed: whether he was travelling at a speed which, under the circumstances, was a reasonable speed, having in mind the condition of the pavement, the heavy rain, the alleged inadequate lighting on the street, and all the circumstances in connection with the unfortunate accident. And the question you must answer in considering that is: what did he fail to do that a prudent man would have done, or what did he do that a prudent man would not have done?

"Happily there is no question arising as to his physical condition at the time, nor, apparently, as to the fact that the car was properly equipped with lights, brakes, and so on; because tests were carried out immediately after the accident by the police and the car was found to be satisfactory in every respect. The evidence showed that the windshield wiper was working satisfactorily on each side of his windshield, and that both windows in the doors of the car were wide open. . . .

"I think you have heard enough to enable you to come to a decision as to whose negligence caused the accident, or whether both were negligent."

The plaintiffs did not make any allegations of negligence in the statement of claim. It may be that counsel for the plain-

tiffs, in his address to the jury, urged that certain acts or omissions constituted negligence of the defendant, and that, in consequence, the jury should answer the question relating to the onus of proof in the negative. Be that as it may, the jurymen need not confine their deliberations within the scope of particular allegations. The conduct of the defendant in each case must be considered by the jurymen from the standpoint of all acts done by him, or omitted to be done by him, under the particular circumstances. There must be no negligence or misconduct on his part. He does not discharge the statutory onus by showing that he was not guilty of negligence or misconduct in certain particulars. The duty of the jurymen is not to examine detailed items of negligence, but to enquire into the whole conduct of the defendant.

I have read and re-read the charge to the jury, a number of times, and tried to put myself in the position of a jurymen. In that position I am left with a definite impression and understanding from the charge that I am to examine the conduct of the defendant in certain particulars only. It is not made clear that a jurymen may consider acts or omissions of the defendant not suggested by counsel or the learned judge. Moreover, after considering the whole conduct of the defendant, a jurymen might be unable to find any specific act or omission constituting negligence or misconduct of the defendant, but, nevertheless, not be satisfied that the loss or damage sustained by the plaintiffs did not arise by reason of negligence or misconduct on his part. In that event a jurymen must answer the question relating to onus in the negative, and the jury should be so instructed: *Newell et al. v. Acme Farmers Dairy Ltd.*, [1939] O.R. 36, [1939] 1 D.L.R. 51; *Bronson v. Evans and Evans*, [1943] O.R. 248 at 277, [1943] 2 D.L.R. 371.

After objection made by counsel on behalf of the plaintiff, the learned judge charged the jury, "I have been asked to make it quite clear to you again that the onus rests squarely on the defendant to prove to your satisfaction that there was no negligence on his part. That onus rests upon him. Any verdict brought in by you must be based upon whether or not the defendant has sustained that onus." But the errors, as discussed, in the charge were not, in my opinion, adequately corrected by this further instruction.

It is further argued that the learned trial judge improperly omitted to charge the jury in the following matters, *viz.*: that the onus of proof under s. 48(1) continues to be on the defendant to the very end of the case, and is not a shifting onus; and that each jurymen may have a different reason for his answer to the question as to whether or not the defendant has satisfied the onus resting on him.

There can be no doubt as to the nature of the statutory onus created by s. 48(1) of The Highway Traffic Act. Lord Wright in *Winnipeg Electric Company v. Geel*, [1932] A.C. 690 at 695, [1932] 4 D.L.R. 51, 40 C.R.C. 1, [1932] 3 W.W.R. 49, quoted by Kellock J.A. in *Bronson v. Evans and Evans*, [1943] O.R. 248 at 275, [1943] 2 D.L.R. 371, says:—

“But the onus which the section places on the defendant is not in law a shifting or transitory onus: it cannot be displaced merely by the defendant giving some evidence that he was not negligent, if that evidence, however credible, is not sufficient reasonably to satisfy the jury that he was not negligent: the burden remains on the defendant until the very end of the case, when the question must be determined whether or not the defendant has sufficiently shown that he did not in fact cause the accident by his negligence. If, on the whole of the evidence, the defendant establishes this to the satisfaction of the jury, he will be entitled to judgment; if, however, the issue is left in doubt or the evidence is balanced and even, the defendant will be held liable in virtue of the statutory onus, whereas in that event but for the statute the plaintiff would fail, because but for the statute the onus would be on him. A fortiori the defendant will be held liable if the evidence actually establishes his negligence”.

Also it is plain that it is not necessary for ten jurymen to agree on their reasons for an answer to the question relating to the statutory onus. On the contrary, each jurymen may have a different ground for his answer: *Newell et al. v. Acme Farmers Dairy Ltd.*, *supra*.

It is desirable that the principles stated in the above quoted cases should be explained to the jury by the learned judge presiding at trial in such a case as this.

It is unnecessary, however, in this particular case to determine whether or not this ground of appeal is well founded. For the reasons given, it is my view that the appeal must be allowed, with costs, and a new trial had between the parties. The costs

of the former trial and of the new trial should be in the discretion of the judge presiding at the new trial.

Appeal allowed and new trial ordered,
RIDDELL J.A. *dissenting.*

Solicitor for the plaintiffs, appellants: J. M. Friedman,
Toronto.

Solicitors for the defendant, respondent: Haines & Haines,
Toronto.

[HOPE J.]

Ferguson v. The City of Toronto.

Municipal Corporations—Borrowing for Local Improvements—Nature and Destination of Fund so Raised—Position where Excess Realized from Sale of Debentures—The Local Improvement Act, R.S.O. 1937, c. 269, ss. 20(2)(e), 44, 49 (as amended by 1941, c. 27, s. 2)—The Municipal Act, R.S.O. 1937, c. 266, s. 319—An Act respecting the City of Toronto, 1917, c. 92, s. 13(c).

Where a municipality raises funds for local improvements, being authorized by a vote of the ratepayers, it is a trustee of the funds so raised, its trust being to expend them for the very purpose to which the ratepayers have devoted them, and it has no power to vary or depart from that purpose. *Cleary v. The Town of Windsor* (1905), 10 O.L.R. 333, applied. Where, therefore, the sale of the debentures, because of a more favourable market than anticipated, brings in more money than is required for the particular work in question, the excess must not be devoted to any general purposes of the municipality, but must be rebated to the owners of property which has been specially assessed for purposes of the local improvement. This is the clear result of ss. 44 and 49 of The Local Improvement Act and s. 319 of The Municipal Act, and s. 13(c) of the Act respecting the City of Toronto, 1917, c. 92, does not give any different power. The enactment, in 1941, of s. 49(9) of The Local Improvement Act did not change the law in this respect, the new subsection being merely a restatement of the existing law.

A MOTION for judgment on the pleadings, the facts having been agreed upon.

The defendant corporation, in 1922, undertook to widen Yonge Street, in the northern part of the city. For that purpose, by-law no. 9999 was passed, providing for the issue of twenty-year debentures in the amount of the estimated cost, and for the imposition of a special rate sufficient to pay, over the period of twenty years, the property owners' share of that cost. In the estimated cost the city officials included an amount for outstanding claims for compensation, and a further amount for a discount in selling the bonds. The claims for compensation were settled at an amount lower than that provided for in the estimate,

and the debentures, because of a favourable market, were sold at a discount less than that anticipated. As a result, more than the full amount of the property owners' share was realized, by the special rate, in nineteen years.

In the writ of summons the plaintiff, described as "suing on behalf of himself and all other ratepayers of the City of Toronto assessed under by-law 9999 of the defendant Corporation", claimed:

"(a) A declaration that the Defendant is not entitled to include in the levy for the year 1943 or in the 1943 tax bills issued by the Defendant the sum of \$74,929.83 (being the twentieth instalment, falling due in 1943, under By-law Number 9999 of the Defendant Corporation, passed on or about 24th March, 1924, to provide for borrowing \$933,791.31 upon debentures to pay for the widening of Yonge Street) or any part thereof."

As appears by the reasons for judgment, other relief was claimed, but at the time of this motion the above paragraph was the only remaining matter in controversy.

28th October 1943. The motion was heard by HOPE J. in Weekly Court at Toronto.

J. R. Cartwright, K.C., for the plaintiff.

F. A. A. Campbell, K.C., for the defendant.

24th November 1943. HOPE J.:—This is a motion for judgment upon the pleadings herein, the facts of the case having been agreed upon. The judgment asked is only upon the first claim contained in the writ of summons, since the defendant has already effected a *pro tanto* refund to the ratepayers in question of certain of the amounts covered by the other claims contained in the writ of summons.

Briefly, the facts of the case, as I understand them, are as follows:

In 1922 the defendant municipality undertook the widening of Yonge Street in the said municipality north of Lawton Boulevard, under the provisions of The Local Improvement Act. No question arises as to the validity of the by-law in question or the propriety of any of the proceedings thereunder. It is alleged as the basis of the claim now under review, that in the sale of the debentures issued for payment of the said local improvement the discount on the sale of the debentures was much less than had been estimated and included in the cost of the work

as permitted by The Local Improvement Act, R.S.O. 1937, c. 269, s. 20(2) (e), which provision at the time of the passing of the by-law was found in R.S.O. 1914, c. 193, s. 19.

The cost of the widening of Yonge Street also included the cost of unfinished work and unsettled claims, as contemplated by s. 44 of the present Local Improvement Act and its predecessors.

As the action was instituted, the plaintiff claimed that the actual cost of the work was much less than the amount levied under the by-laws, firstly, by reason of the fact that the estimated cost of the unfinished work and the unsettled claims was less than the actual cost thereof, and, secondly, by reason of the discount on the sale of the debentures being substantially less than estimated.

The defendant municipality has, since the commencement of this action, rebated to the assessed ratepayers the ratepayers' quota of that part of such excess as directed by s. 44(3) of The Local Improvement Act. As the law stands at present, a similar *pro tanto* refund of the excess realized from the sale of the debentures over and above the estimated amount thereon would now be required from the municipality to the assessed ratepayers, by virtue of the amendment to s. 49 of The Local Improvement Act, as effected by 5 Geo. VI (1941), c. 27, s. 2. The defendant contends, however, that the 1941 amendment is not retroactive.

It is necessary to note the general procedure or practice which has been followed by the defendant in dealing with surplus funds resulting from the more favourable sale of its debentures than had been anticipated in the estimating of the cost of a local improvement. Upon the sale of debentures, should the proceeds be less than were estimated, the city at large is required to bear the whole of the deficiency, there being no provision for increasing to the ratepayers concerned the already "rated" costs. Generally, however, it would appear from the statement submitted by counsel for the defendant, the proceeds realized are adequate to cover the estimate, but in case of a more favourable debenture market than anticipated, a surplus of funds over the amount estimated frequently results. Also, according to counsel's representations, and the city treasury's practice, any such surplus funds were transferred to and formed a special fund known as "the completed local improvement reserve". Being debenture funds arising mostly from ten-year debenture issues, the surplus

so accruing was then applied over a period of ten years (one-tenth each year, as being the approximate average for all issues) through the revenue as an offset to that extent of the City's share of other local improvement debt charges. Such disposition was justified by the treasury officials on the ground that it was a benefit to all of the general taxpayers, who, of course, have to make good any shortages arising from over-estimating the proceeds of the sale of local improvement debentures generally. Such shortages as have occurred have heretofore been met from this reserve.

To justify its procedure, the defendant relies upon the provisions of the Act respecting the City of Toronto, 7 Geo. V (1917), c. 92, s. 13, and in particular clause (c) thereof, which reads as follows:

"The said Corporation may: . . .

"(c) Transfer to the sinking fund, from time to time, the unrequired balance of any loan which may have been secured through the issue of debentures".

There is no definition in the 1917 Act, or in The Local Improvement Act or The Municipal Act, of the words "sinking fund."

Webster's New International Dictionary defines "sinking fund" as "the aggregate of sums of money set apart and invested, usually at fixed intervals, for the extinguishment of the debt of a government, or of a corporation, by the accumulation of interest".

Murray's New English Dictionary defines "sinking fund" as "A fund formed by periodically setting aside revenue to accumulate at interest, usually for the purpose of reducing the principal of a national, municipal, or company's debt."

In *R. ex rel. Clarey v. Plant* (1923), 24 O.W.N. 6, the present Chief Justice of the High Court said: "A sinking fund is something which is to provide for the payment of the debt when the debt becomes due".

In *Levy v. McClellan* (1909), 196 N.Y. 178 at 197 it is stated that "The object of every sinking fund is to diminish the debt, whose existence warranted its foundation".

Again, in *The Tennessee Bond Cases* (1884), 5 S. Ct. 974, 1098, 114 U.S. 663 at 698, it is stated that "A sinking fund may be, and generally is, intended as a cumulative security for the payment of the debt with which it is connected."

Counsel for the plaintiff, however, contended that the defendant must be governed in its dealings with any surplus funds by the provisions of The Municipal Act R.S.O. 1937, c. 266, s. 319, which reads:

“Money received by any municipal corporation from the sale or hypothecation of any debentures shall be kept in a separate account and shall be used only for the purposes for which the same was raised and shall not be applied towards payment of the current or other expenditure of the municipality.”

It was further argued that the prohibition contained in this last section is not by any means inconsistent with the special Act of 1917, and that the use of the words “sinking fund” in the Act of 1917 only refers to the sinking fund which is established in connection with the particular debentures issued under the by-law in question.

In the alternative, Mr. Cartwright argued that even if there is an inconsistency, then the provision of the special Act of 1917 is overridden by the more extensive prohibition and direction contained in s. 319 aforesaid, as being repugnant thereto.

The general rule of interpretation as to the effect of a general statute on an earlier enactment in the nature of a special Act is stated by the Earl of Selborne L.C. in *Seward v. The Owners of the “Vera Cruz”* (1885), 10 App. Cas. 59 at 68 to be “that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.”

In *The Lancashire Asylums Board v. The Lord Mayor, etc. of the City of Manchester*, [1900] 1 Q.B. 458 at 470, it is stated by A. L. Smith L.J.: “There is a well-known rule which has application to this case, which is that a subsequent general Act does not affect a prior special Act by implication. That this is the law cannot be doubted”.

But, as is stated in Craies on Statute Law, 4th ed., p. 324: “the rule must not be pressed too far, for, as Bramwell, L.J., said in *E. Pellas & Co. v. The Neptune Marine Insurance Co.* (1879), 5 C.P.D. 34 at 40, ‘a general statute may repeal a particular statute.’ And if a special enactment, whether it be in a public or a private Act, and a subsequent general Act are ab-

solutely repugnant and inconsistent with one another, the Courts have no alternative but to declare the prior special enactment repealed by the subsequent general Act." *Vide Bramston and Round v. Mayor, etc. of Colchester* (1856), 6 E. & B. 246, 119 E.R. 856.

But in this light, I feel, reference must also be made to s. 49(5) of The Local Improvement Act: "The special rates imposed for the owners' portion of the cost shall form a special fund for the payment of the debentures issued under the authority of subsection 2 and the interest thereon and shall not be applicable to or be applied for any other purpose."

This same provision was carried through the earlier statutes and prevailed at the time of the passing of the by-law in question herein.

I am of the opinion that there is no inconsistency as between the provisions of the later general Acts and the special Act of 1917. The sinking fund referred to in s. 13(c) of the special Act can only be the sinking fund resultant from and in connection with the debt whose existence warranted the foundation of the fund, and even although the City's contention might be held to be correct in connection with the powers claimed by virtue of the special Act of 1917, *viz.*, to use surpluses for general purposes, the same is utterly inconsistent with and repugnant to the tenor of the general practices countenanced by The Local Improvement Act and by The Municipal Act, as hereinbefore noted.

In dealing with the question of a clause in a private statute being repealed by a subsequent public Act, Pollock C.B. in *The Great Central Gas Consumers Company v. Clarke* (1863), 13 C.B.N.S. 838 at 840, 143 E.R. 331, said: "Although that section is not in terms repealed, yet it becomes a clause in a private act of parliament quite inconsistent with a clause in a subsequent public act. That is sufficient to get rid of the clause in the private act."

I am of the opinion that the defendant's use of the surplus funds in question cannot be justified by reliance on the powers contained in the special Act.

Giving the language of the special Act its natural and normal meaning, I am unable to find even by inference anything warranting the procedure followed by the defendant.

On the contrary, in both The Municipal Act and The Local Improvement Act as cited *supra*, there is a direct statutory prohibition of such an application of the funds.

What, then, becomes of the surplus of the rates collected for the owners' portion of the local improvement costs? By virtue of the statutory amendment of 1941 *supra*, there would now be no difficulty. I cannot consider, however, that that amendment is retroactive in its scope. In the absence of any statutory direction such as is contained in this recent amendment, what action is, therefore, demanded in connection with the particular surplus funds?

In *Cleary v. The Town of Windsor* (1905), 10 O.L.R. 333 at 335, in dealing with the question of funds raised under The Local Improvement Act, Anglin J. stated:

"The raising and the expenditure of this money is authorized by the vote of the ratepayers for a particular purpose. The municipal council has no power to vary or depart from that purpose. It is a trustee of the funds so raised, its trust being to expend them for the very purpose to which the ratepayers have devoted them".

Semble, in the case at bar the moneys were raised and the expenditure authorized by statute, (s. 49(5) of The Local Improvement Act) which precludes the use or application of the special rates imposed for the owners' portion of the cost for any other purpose. The same can therefore only be held in trust for the parties from whom the funds were raised, namely, the owners. The purpose of the fund having been fully satisfied without the expenditure of the fund specifically raised for the project, there is, in my opinion, a resulting trust with respect to any surplus.

Underhill's Law of Trusts and Trustees, 9th ed., p. 158, Art. 27, states:

"When it appears to have been the intention of a donor that the donee was not to take beneficially, there will be a resulting trust in favour of the donor or his representatives in the following cases . . .

"(b) if [the instrument] directs that [the beneficial interest] shall be applied for a particular purpose (as distinguished from a mere subjection to such purpose) which turns out to be insufficient to exhaust the property."

It seems to me that the enactment of 1941, *supra*, dealing with the disposition of such a surplus fund, is but a restatement of what was the common law applicable to the facts herein.

I am of opinion, therefore, that the funds in question herein should be rebated *pro tanto* to the owners of the lands assessed.

On behalf of the defendant, it was suggested that the moneys in question herein have already been expended and are therefore not now available for rebate. This situation can, however, hardly relieve the defendant from its duty to account for the trust funds.

In *In re Hallett's Estate; Knatchbull v. Hallett* (1879), 13 Ch. D. 696, it was held that if a person who holds money as a trustee or in a fiduciary character pays it to his account at his bankers and mixes it with his own money, and afterwards draws out sums by cheque in the ordinary manner, the drawer must be taken to have drawn out his own money in preference to the trust money.

Counsel for the defendant also reviewed at considerable length the history of local improvement rates and the operation of by-laws imposing the same. He stressed the finality of the levy as being beyond the power of the Court to alter. In doing so, counsel relied upon the decision of Kingstone J. in *The City of Toronto v. The Toronto Transportation Commission*, [1937] O.R. 42 at 46, [1937] 1 D.L.R. 522, 46 C.R.C. 34, *viz.*, "... this Court is bound by the decision of the Court of Appeal in the case of *City of Ottawa v. Ottawa Public School Board* (1923), 54 O.L.R. 633. As stated by Riddell J.A. there is no provision in the case of land once liable for tax ceasing to be so liable on a change of ownership" to which Kingstone J. added "Local improvement taxes are imposed once for all". With this appellate judgment I must conform, and with the addition by Kingstone J., I am in full accord within the confines of the facts of that case. But in the present action, there is quite a different aspect, *viz.*, an over-collection of rates for the particular local improvement—with a statutory prohibition against any other application of such a surplus.

It is unnecessary for me to direct the mechanics to effect the rebate. The actual rebating or refunding of part of the excessive collection of rates has already been carried out, and apparently satisfactorily, by the treasury officials of the defend-

ant municipality. If the parties cannot agree as to the mechanics, I may be spoken to further in connection therewith.

While it may not fall within my consideration for the purpose of this judgment, yet I feel constrained to say that the procedure followed by the City, however lacking in specific statutory authority, unquestionably appears to have been carried out in the greatest good faith by the officials of the municipality, with the evident thought in their minds that lacking statutory direction, save in the special Act, which, in my opinion, was misconstrued, the process adopted by them was, over a period of years, fully equitable to the ratepayers of the municipality generally. I do not think that such good faith should be seriously questioned.

Judgment is accordingly granted in favour of the plaintiff with costs.

Judgment for plaintiff with costs.

Solicitors for the plaintiff: Smith, Rae, Greer & Cartwright, Toronto.

Solicitor for the defendant: C. M. Colquhoun, Toronto.

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